Supreme Court, U.S.
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In The

Supreme Court of the United States

JACK HARGROVE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. § 1346, by omitting comprehendible standards concerning "intangible rights and honest services" in private actor cases, renders petitioner's private actor convictions invalid because § 1346 is unconstitutional, pursuant to this Court's Fifth Amendment's void for vagueness jurisprudence, based on the absence of fair notice regarding prohibited conduct which creates an undue risk of arbitrary and discriminatory criminal enforcement.

II. Whether petitioner's convictions for conspiring to violate federal mail and wire fraud statutes, where those convictions incorporated – honest services and intangible rights – should be reversed where the trial court refused to charge the jury that petitioner's "compensation" as a corporate officer/employee did not comprise "private gain."

PARTIES TO THE PROCEEDING

Petitioner is Jack L. Hargrove, defendant-appellant below. Additional defendants in the district court, who were not parties in the court of appeals, and are not parties here, are James R. Wallwin, Laurence Capriotti and George J. Stimac. Michel D. Thyfault was tried with petitioner and was partially acquitted. Thyfault was a party to petitioner's consolidated appeal, but his appeal was severed from petitioner's by the Seventh Circuit (No. 07-2769). Thyfault is not a party to this petition.

Respondent is the United States of America, appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jack L. Hargrove, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 579 F.3d 752. App. 1-5. Relevant opinions of the United States District Court for the Northern District of Illinois are unpublished, but are reproduced at App. 7-17.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 26, 2009. App. 1-6. A petition for rehearing was denied on September 23, 2009. App. 30. On November 17, 2009, Justice Stevens extended the time for filing this petition for a writ of certiorari until February 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

18 U.S.C. § 1341 provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails] shall be fined under this title or imprisoned not more than 20 years or both.

18 U.S.C. § 1343 provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits . . . by means of wire, radio, or television communication in interstate or foreign commerce . . . for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years or both. . . .

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a

scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

INTRODUCTION

This petition presents questions concerning 18 U.S.C. § 1346, and whether petitioner's private sector/honest services convictions should be reversed.

1. BACKGROUND OF "SCHEMES TO DEFRAUD."

Momentarily bereft of record citations, the schemes were driven by an erstwhile Illinois attorney, Laurence Capriotti (Capriotti), who was a real estate title maven and general counsel for Intercounty Title of Illinois (Intercounty), a privately held corporation. Capriotti hoped to buy Intercounty but lacked the funds. During the early 1980s, petitioner, a carpenter by trade, and fledgling condominium developer, was referred to Capriotti because of problems concerning providing clear titles to his developed condos. As petitioner described during trial, it took Capriotti about ten minutes to solve petitioner's difficulties.

During the mid-1980s, Capriotti, often acting as petitioner's attorney, importuned petitioner to provide funding so that Capriotti could purchase 80% of Intercounty (petitioner would own 40%/same with Capriotti). The third investor was Stewart Title

Guarantee (Stewart), which had been issuing its title policies for Intercounty since the early 1970s. During those years Stewart earned millions of premium dollars for providing Intercounty's title insurance (Intercounty served as Stewart's title agent). Sans record dispute, petitioner had no understanding of the real estate title industry.

During the first few years Intercounty was making money and Capriotti had installed petitioner as Chairman of the Board – in order to keep petitioner out of harm's way. Toward the late 1980s there was a drop-off in Intercounty's business and Capriotti had invested Intercounty funds in "junk bonds." After those investments soured, Capriotti schemed keeping Intercounty afloat by, *inter alia,* dipping into its escrow funds, falsifying records, creating at least a trio of successor [Intercounty] corporations, and by the spring of 2000 when Intercounty closed its doors, it had lost millions of dollars. A plethora of civil lawsuits resulted in the return of most of the stolen escrow funds, and the ensuing federal criminal proceedings are the subject of this petition.

2. SUPERSEDING INDICTMENT.

In a 2003, multi-count superseding indictment, petitioner and others were charged with misappropriating millions of dollars from Intercounty and Intrust, a separate trust entity. The indictment charged multiple counts of conspiracy to violate mail/wire fraud statutes in violation of §§ 371, 1341,

1343 and 1346. Count one (reciting the putative schemes in violation of § 1341, *et al.*) charged that petitioner's conduct was contrary to "honest services" and "fiduciary duties." R. 117 at p. 8 (When one owes a fiduciary duty to someone, one is required to provide that person or entity with honest services, and to treat that person or entity with undivided loyalty, good faith, fairness and honesty.), pp. 10-11 (CAPRIOTTI, HARGROVE and THYFAULT also breached their fiduciary duties as directors of Intrust, and thus fraudulently deprived Intrust of its right to receive honest services from its directors) and p. 16 (fiduciary duties). Counts two-seven charged either mail or wire fraud, incorporating-by-reference, the "honest services-fiduciary duties" language embraced in count one. Count eight charged an overall conspiracy in violation of 18 U.S.C. §§ 371 and 1346 (incorporating antecedent mail/wire fraud facts). R. 117 at p. 30 (. . . and after November 18, 1988, the intangible right of honest services, * * * in violation of 18 U.S.C. § 1343 and 1346).

The essence of the "honest services" scheme(s) charged petitioner, Capriotti, and others with misusing escrow monies. Beyond dispute, the escrow funds were stolen at Capriotti's direction, with the help of his outriders James Wallwin, George Stimac, Thyfault and others (summarizing relevant testimony, *infra* at pp. 6-8, 9-22).

3. PIVOTAL "SCHEME TO DEFRAUD" PARTICIPANTS NOT APPEARING AS TRIAL WITNESSES.

A. Capriotti was the owner, president and director of Intercounty Title of Illinois and its successors from the middle 1980s until 2000, when all Intercounty companies ceased doing business. Tr. 187-91. He was also an Intrust director. Tr. 200. Intrust, an Illinois trust company, was acquired by Intercounty/petitioner during the late 1980s. Capriotti devised an adroit scheme whereby Intrust would transfer millions of dollars to Intercounty, ostensibly for the purchase of U.S. Treasury obligations. But Capriotti bought "junk bonds," resulting in Intrust losing millions of dollars. (More concerning Intrust at pp. 7, 12-16, 17-18, 20-21, *infra*).

Capriotti, the moving force behind the escrow theft which culminated in the demise of the Intercounty/Intrust entities, pleaded guilty, pursuant to a plea agreement, to the majority of the mail/wire fraud, conspiracy and IRS tax evasion offenses and was sentenced to fourteen years in federal custody.

B. Michel Thyfault (Thyfault), a Certified Public Accountant, was Intercounty's CFO from 1989 to 1996. Thyfault Dep. 3, 6, 76-77.[1] Thyfault was also

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[1] Referring to Thyfault's deposition taken during the civil lawsuits filed in the wake of Intercounty's collapse, *e.g.*, *Fidelity, et al. v. Intercounty, et al.*, 412 F.3d 745 (7th Cir. 2005); *Stewart Title v. Fidelity Natl. Title*, 00 CV 7086 (N.D. Ill.), and several others in the U.S. District Court, Chicago, Illinois. After all was

(Continued on following page)

an Intrust director until December 1994. Tr. 190-91, 200. Thyfault was responsible for tracking the value of Intrust deposits [to Intercounty], but his "spreadsheets" [to Intrust] falsely reflected the value of the transferred funds (Intrust transferred funds to Intercounty and Intercounty transferred those funds to its Chicago bank accounts). Tr. 688-93, 1783, 2005, 2151-52, 2407. After Capriotti fired Thyfault, Intercounty continued forwarding bogus spreadsheets to Intrust. Gov. Exhs. 412, 460, 650, 919-8 to 919-11. When Thyfault was fired in 1996 over $53 million had been transferred from Intrust to Intercounty. Gov. Exhs. 460, 650, 940; Tr. 1697-1700, 2404-09. Capriotti later explained to George Stimac – that Thyfault was given a substantial severance package because he was the "weak link," and the package was designed to "keep him [Thyfault] quiet." Tr. 1230-31.

Thyfault was tried with petitioner and was acquitted on count eight ("honest services" conspiracy in violation of 18 U.S.C. §§ 371 and 1346 incorporating the conduct charged in counts one-seven; as to Thyfault the jury "hung" on counts one-four). R. 218-20. Post-trial, the district court granted Thyfault's motion to dismiss the "hung" counts based on issue preclusion. R. 339. The government successfully appealed the dismissal of Thyfault's indictment, *U.S. v. Thyfault*, 579 F.3d 748 (7th Cir.

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said and done Fidelity returned over $36 million dollars taken from Intercounty escrow deposits.

2009), and the Seventh Circuit held that *Yeager v. U.S.*, 129 S.Ct. 2360 (2009), failed to support the district court's dismissal of Thyfault's indictment. Thyfault's case remains pending in the district court.

C. Susan Peloza (Peloza) worked for petitioner during the 1970s and early 1980s while she was developing condominium conversions. By the early 1980s, she handled real estate sales, closings, marketing, bookkeeping and opened petitioner's initial construction office. Tr. 2812-13. After petitioner invested approximately $2 million dollars in Intercounty, Peloza went to work for Intercounty.

Peloza was frequently mentioned during petitioner's trial because, post-1995, she was the president and majority owner of two or more Intercounty entities. 03 CR 779 at Gov. Filing at R. 74, pp. 2-6, Indictment at R. 117, p. 2 at ¶ 1(g); p. 4 ¶ K. Following petitioner's sentencing (June 29, 2006), Peloza pled guilty to a single count misdemeanor IRS offense and was sentenced to probation on September 19, 2007 (07 CR 498).

D. Terry Cornell (Cornell) was hired during the mid-1990s as Capriotti's bodyguard. After 1995, Cornell (like Peloza), was "promoted" to corporate executive positions. Cornell, with the benefit of the same plea agreement enjoyed by Peloza, pled guilty to

an IRS misdemeanor receiving probation (07 CR 498).[2]

4. PERTINENT PRETRIAL PROCEEDINGS.

In advance of trial, petitioner, represented by counsel and enlarged pending trial, moved to dismiss counts one-eight contending, *inter alia,* that "honest services" failed to charge a cognizable federal offense, and was subject to dismissal based on the void-for-vagueness doctrine embodied within the Due Process Clause of the Fifth Amendment. R. 40 at pp. 1-3. App. 69-72. The district court rejected petitioner's "honest services" dismissal importunings. R. 73 at pp. 6-7. App. 16. Petitioner and Thyfault stood trial commencing August 8, 2005.

5. SUMMARY OF RELEVANT TRIAL TESTIMONY.

Intercounty, as a real estate title agent, provided title policies guaranteed by Stewart Title until 1995, and Fidelity Title from 1995-2000. In turn,

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[2] Petitioner's post-trial motion (PTM) contended that he was denied a fair trial because the government refused to immunize Peloza or Cornell, asserting they would have provided exonerating testimony on petitioner's behalf. R. 224 at ¶ 12. His PTM also contended that his trial was skewed because the government refused to require Capriotti to testify as part of his plea agreement, and when attorneys for petitioner sought Capriotti's testimony, they were informed he would invoke "the Fifth Amendment." R. 224 at ¶ 13.

Intercounty forwarded millions of dollars in premiums to Stewart and Fidelity.

Government witness Malcom Morris ("Morris") was the titular head of Stewart Title and related companies ("Stewart"). As of 2004, Stewart, a publicly traded corporation (with related entities) had about 10,000 employees and revenues of around $2.1 billion dollars. Tr. 214-15, 218. Stewart issued its title insurance for Intercounty reaching back to about 1974 when Capriotti was Intercounty's general counsel. *Id.* at 218-20. Morris and Capriotti discussed Capriotti's desire to purchase Intercounty and in 1984 a deal was struck which included Stewart purchasing 20% of Intercounty, with Capriotti and petitioner each owning 40%. Tr. 220-21. Morris understood that Susan Peloza would be petitioner's eyes and ears at Intercounty. Tr. 222, 430. In part, Morris testified that "Capriotti ran Intercounty," and had a limousine, bodyguard, and was concerned about people investigating him. Tr. 330-33. Regarding petitioner, it appeared to Morris that he failed to understand the [title] business, and he learned from Capriotti that petitioner had one year of high school, started out as a carpenter and had a great deal of difficulty reading. Tr. 337-38, 343-47. According to Morris, in advance of a scheduled audit by Stewart, Capriotti left a voice message . . . if the auditors showed up they would be "shot at the door." Tr. 345. Morris testified regarding Capriotti's "defeasance" program which involved some $40,000,000 in commercial mortgages. Stewart was responsible for

guaranteeing the commercial mortgage titles and Capriotti, after meeting someone named Milken, had used the defeasance fund to purchase "junk bonds," rather than U.S. government securities which provided a loss guarantee. Tr. 231-41, 350-52; Capriotti's "defeasance" methodology described *infra* at pp. 10-11, 15.

Former Intercounty treasurer, James Wallwin (Wallwin), testifying with the benefit of a plea agreement, described Capriotti as being the "boss," although Intercounty had different presidents at different times. Tr. 728-29, 765. Wallwin testified, at Capriotti's direction, that he and others falsified Intercounty's financial records enabling Intercounty to continue having the benefit of Stewart's title policy coverage. Tr. 634-43. Per Wallwin, Capriotti controlled all of Intercounty's financial dealings, and understood that petitioner developed real estate, getting his costs reimbursed, with profits "earmarked" for Intercounty. Tr. 766.

George Stimac (Stimac) was the Intercounty comptroller from the late 1980s until 1997. Stimac, like Wallwin, pled guilty with the benefit of a plea agreement. Tr. 1163-65, 1246-47, 1276-78, 1333-35. Stimac testified, *inter alia,* that he was responsible for preparing Intercounty's financial data, and when its operating accounts were short, Capriotti directed that monies be transferred from Intercounty escrow accounts to its operating accounts. Tr. 1196-1200. Stimac schemed with Capriotti and Wallwin, without petitioner's knowledge, to falsify Intercounty records

in advance of Stewart audits. Tr. 1219-23, 1308-14, 1350-51.[3] Several former Intercounty employees testified for the government including Theresa Crane. Tr. 142-85. Like the others, she testified that Capriotti ran Intercounty's day-to-day operations, and Peloza and Cornell were partners in post-1995 Intercounty companies. Tr. 167, 173-76.

Gary Bertacchi (Bertacchi), was Intrust's vice-president during the early 1990s, later becoming its president; he was responsible for investing Intrust's monies. Tr. 1970, 1979, 1986-87. In January 1991, he discovered an agreement authorizing Intercounty to invest Intrust's escrow funds, and Intrust had previously forwarded millions of dollars to Intercounty. According to that agreement, Intrust was to own and control its escrow, with Intercounty serving as its agent – holding Intrust monies – for the benefit of Intrust; Intercounty was authorized to invest "Intrust" money in U.S. Treasury securities. Tr. 1980-83.

Bertacchi, Capriotti, petitioner and Peloza were Intrust corporate directors; petitioner was Chairman

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[3] It was Stewart's practice to "audit" [its] title agents, because it was issuing millions of dollars in title policies based on submissions from its title agents; to satisfy Stewart's "audits" Capriotti directed Wallwin and others to falsify Intercounty escrow and operating records.

Notwithstanding their admitted criminal complicity with Capriotti, Stimac and Wallwin were sentenced to probation on September 18, 2008. 03 CR 779 at R. 412, 413.

of the Board. Tr. 1988-95. Bertacchi and Capriotti frequently discussed problems involving Intercounty's escrow and the commingling of Intercounty/Intrust funds. Capriotti's response to Bertacchi's concerns were always the same: Capriotti would look into it and correct any problems. Bertacchi prepared memoranda for Capriotti and petitioner regarding the continued commingling of "Intrust's" funds. Although Illinois State regulators were concerned – Capriotti always assured Bertacchi that he [Capriotti] would correct the problem. Tr. 1998-99, 2007-13.

After Capriotti claimed to have created a segregated account for Intrust funds, Bertacchi authorized Stimac, Intercounty's comptroller, to transfer millions of dollars into the [now] segregated account. Tr. 2015-16. Bertacchi never heard from Stimac or anyone at Intercounty, prompting Bertacchi to cobble further memorandas to Capriotti because Bertacchi believed "Intrust" funds were not in the segregated account, but were deposited in different Capriotti investments. Notwithstanding Bertacchi's ongoing efforts, nonetheless, at a subsequent board meeting, Capriotti claimed he was still in the process of "segregating" Intrust funds. Tr. 2017-19. Bertacchi advised petitioner of Capriotti's unfulfilled promises but petitioner failed to respond because he was living in Florida most of the time (but was generally available by telephone and occasionally in person). In all events, petitioner was unable to get Capriotti to solve the Intrust difficulties. Tr. 2021-27.

During late April 1999, during taped conversations, Capriotti assured Bertacchi that a new segregated "Intrust" account had been established in compliance with Illinois State Regulator's concerns regarding the "Intrust/Intercounty" escrows. Tr. 2057-61, 2064-67. Because of those assurances Bertacchi forwarded $9.2 million to Intercounty. Tr. 2072-2083. Assurances notwithstanding, Capriotti failed to established the segregated account and Intrust's funds were not returned. Tr. 2084, 2088-89.

After Bertacchi's repeated plaints regarding the intermingling of "Intrust" funds were never resolved, he contacted the Illinois Bank and Trust regulators. Tr. 2105-08. In response, Illinois regulators issued an order directing Intrust to take control of its assets by a date certain. Capriotti, with his consonant excuses, failed to comply. Tr. 2125-30. Later, toward the end of 1999 and early 2000, Bertacchi refused Capriotti's demands for more Intrust funds, and on April 14, 2000, Illinois regulators placed Intrust in receivership. Tr. 2154-58, 2171.

Michael Pierce (Pierce) testifying as a government witness, explained that he was a CPA and provided petitioner with tax and financial advice reaching back to the early 1980s. Tr. 929-31. Pierce also furnished tax and auditing services for Intercounty, Intrust and Madison; petitioner owned Madison, which owned Intrust. Tr. 931-33. Pierce's 1988 Intercounty audit disclosed that it lost $7.1 million, but petitioner and Capriotti represented that they would put $4.3 million into the company so it

could operate through 1989. Tr. 936-41. Pierce was aware of "CAPJAC" which either loaned monies to, or borrowed from petitioner, Capriotti and their related entities. Tr. 941-43. Pierce's audit reports did not include escrow accounts, but discussed the "defeasance" program (a/k/a "purchase title indemnity transactions"). Tr. 944-45. Concerning the Intercounty "defeasance" program, Pierce explained that Capriotti devised a method of accumulating proceeds from individual condo sales, which permitted title policies to issue for each sold unit. When enough money was accumulated from the sale of individual units, then the entire condo project mortgage would be paid-off. Tr. 953-62.

During the 1980s petitioner was involved in two condo conversion projects, but poor market conditions caused him to return the conversions to rentals. As market conditions improved, Pierce arranged collateralized loans on the condo units which generated cash for Intercounty. Tr. 952-57. In connection with "CAPJAC," petitioner requested that Pierce assist in an IRS audit, telling Pierce that Peloza had the records; as it turned out all "CAPJAC" checks, some reaching back to 1988, were signed by Peloza. Tr 995, 998.

Pierce testified that although petitioner was the nominal Intrust owner, Capriotti saw an opportunity to make money, and Pierce and Capriotti met with Illinois regulators. Tr. 1001-02. Regarding Intrust forwarding money to Intercounty, Capriotti told Pierce that the pooling of Intrust/Intercounty funds

yielded a higher interest rate. Tr. 1003. Because Pierce had several questions regarding Intrust/ Intercounty, he spoke with Bertacchi – who directed him to Capriotti. But Capriotti provided no records or information, resulting in Pierce issuing an unfavorable audit opinion letter. Tr. 1005-06. Pierce testified that he was not impressed with the Intrust/ Intercounty agreement regarding the pooling of Intrust investment funds. Tr. 1006-12.

The government's case-in-chief included IRS and summary witnesses identifying several dozen exhibits concerning IRS counts (nine-twelve). That testimony and those exhibits are not challenged within this petition because petitioner is not challenging his IRS convictions on counts nine and eleven.

At the conclusion of the government's case-in-chief, petitioner's Rule 29 – judgment of acquittal motion – again maintained that "honest services" failed to provide "adequate notice of the proscribed conduct, thereby violating the due process clause of the Fifth Amendment to the United States Constitution." R. 198. App. 63-64. *Sub silentio*, the district court denied petitioner's Rule 29 motion.

The Defense Case: Petitioner presented the stipulated government-proffer-statements from former Intercounty attorney, Allan Hurwick (Hurwick – who died before petitioner's trial). Tr. 2784-96. Hurwick worked for Intercounty for several years, and was Capriotti's "confidant."

Hurwick told the government that during the summer of 1997 he went to Capriotti seeking information concerning monies forwarded by Intrust to an Intercounty escrow account. Capriotti explained to Hurwick [that] there was a problem – but he was taking care of it (referring to Bertacchi and Intrust). Tr. 2785-86. Capriotti told Hurwick that money was missing, and Hurwick had to "be quiet," otherwise the company would go under and jobs would be lost. Tr. 2786. Capriotti directed that $3.5 million be forwarded to Intrust from Intercounty's escrow account; he and Capriotti knew that was wrong. Hurwick prepared false reports regarding the Intrust monies, while acknowledging that he embezzled money from Intercounty – used for home improvements and a "bar mitzvah." Tr. 2787.

During early 1995, Capriotti closed Intercounty [of Illinois], simultaneously creating successor Intercounty companies; he installed Peloza and Cornell as owners of those newly formed entities, but remained "the moving force." Tr. 2788. According to Hurwick he did what he was told by Capriotti because Capriotti had a "rough" Chicago Heights background, knew "Italians in the Mafia," and had "knifed" someone while in high school. Tr. 2788. Per the stipulation, Hurwick prepared false spreadsheets, which were forwarded to Intrust, and per Capriotti's direction, Hurwick signed at least one false letter to Bertacchi regarding Intrust escrow monies. Tr. 2789.

During April 1999 Intrust wired $9.2 million into the Intercounty master escrow account which was

used for overdrafts – not invested. Tr. 2790. Hurwick knew that Capriotti was moving money around to disguise the transaction (explaining how Capriotti was hiding the money). Tr. 2790. Capriotti told Hurwick to "lie" regarding Intercounty's master escrow account and was directed by Capriotti to say that the money was used to buy CDs. Tr. 2792-93. Hurwick was "fearful" of Capriotti because Capriotti had threatened to kill him if he betrayed Capriotti. Tr. 2793-94. Hurwick also told the government:

> Hurwick advised that he believed Capriotti specifically told him not to mention anything to Hargrove and Susan Peloza.

Tr. 2794. Hurwick's proffer recounted Capriotti's directing him to prepare "bogus" signature cards for the Illinois State Regulators because they had demanded that Intercounty create [a] "segregated" Intrust account – which was never set up. Tr. 2795.

Petitioner testified that he was 64 years old, a high school drop-out because of his inability to read, and began working as an apprentice carpenter. While learning carpentry in 1968 he was drafted, and while in military service ran a construction crew for the U.S. Marines in Antarctica. Tr. 2799-2804. Honorably discharged in 1972, he married and did carpentry/ construction work. *Id.* at Tr. 2805-08. Eventually petitioner started his own profitable construction business, doing rehab and condo conversions. *Id.* at 2808-15.

During the early 1980s, after petitioner had converted rental units into condominiums, he encountered difficulties in obtaining clear title for the sold units. Around 1982 or 1983 he was referred to real estate title attorney Capriotti who, employing the "defeasance" program solved petitioner's title difficulties. Tr. 2815-21. Around 1983 Capriotti urged petitioner to buy into Intercounty. Capriotti lacked the necessary capital and petitioner agreed to furnish the required money with the understanding that petitioner's role would be limited to potentially developing real estate projects. *Id.* at 2821-23. In 1983 or 1984 petitioner "put up" about $2 million dollars for himself and Capriotti to buy 80% of Intercounty, and during 1988 loaned Intercounty $800,000. Tr. 2824-25 (Stewart became a 20% Intercounty owner). Capriotti installed petitioner as Intercounty's Chairman of the Board, supposedly a place petitioner "could go to and would not get into any trouble." Tr. 2827. Petitioner agreed that he signed many, many documents knowing nothing of their content; importantly, *he had no authority to sign Intercounty checks.* Petitioner testified that he relied on Capriotti as his attorney in all legal matters concerning Intercounty. Tr. 2827-29. Intercounty was successful during the mid-late 1980s and petitioner received reasonable compensation and benefits. *Id.* at 2830-31.

During the late 1980s or early 1990s, Capriotti decided to go to various Chicago-area banks and invest in Public Relations Certificates of Deposit ("PR

CDs"). Petitioner understood that the CD funding came from Intercounty operating accounts, and their purpose was to encourage banks to fund real estate developments. Tr. 2866-71. Petitioner signed the required documents – without knowing that the funding for the CDs came from Intercounty escrow accounts. Further, petitioner testified that he was not aware that the PR CDs were cashed in (two of his IRS charges concerned failing to report income resulting from the cashing in of PR CDs). Tr. 2869-71.[4]

At some point during the late 1980s or early 1990s, Capriotti wanted to own a "trust" company, but it couldn't be in his name because of undisclosed Illinois banking regulations. Petitioner had purchased a company (Madison), and at Capriotti's urging, Madison purchased "Intrust," an Illinois trust company. Unbeknown to petitioner, either during or immediately after Intrust was purchased, Capriotti directed the execution of an agreement authorizing Intercounty to invest Intrust escrow funds. Tr. 2936-37. Petitioner learned of that agreement in 1992, and signed additional authorizing documents because

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[4] Petitioner conceded that his signature appeared on many of the PR CDs and other Intercounty documents, but he denied signing those – and other documents which the government maintained he had executed. Tr. 2869-70. As example, the government maintained petitioner signed various agreements between Stewart and Intercounty on February 16, 1995. But he testified, absent contradiction, that he was in Florida at the time and denied signing the Stewart/Intercounty agreements. Tr. 2911-12.

Capriotti represented that the Intrust escrow monies, invested by Intercounty, provided enhanced banking benefits (Capriotti told petitioner that the Intrust funds provided benefits based on "compensating balances."). Tr. 2930, 2937-40, 2950. In reality, starting in about 1994, the Intrust escrow monies transferred to Intercounty, were, at Capriotti's direction, used to keep Intercounty afloat.[5]

During 1995, Capriotti, while creating new entities (ITI Enterprises and INTIC – still referred to as Intercounty), ceased doing business with Stewart, and Peloza and Cornell became the titular heads of the newly-minted companies, and Capriotti substituted Fidelity Title as the successor Intercounty title guarantor. Tr. 2917-19.

During 1998 Capriotti and petitioner had disagreements concerning Intercounty real estate developments, resulting in Capriotti ousting petitioner from Intercounty. In response, petitioner sent letters to Capriotti and Capriotti's Intercounty lawyer, demanding an accounting of all Intercounty monies. Tr. 2929-30. Eventually, without an audit or

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[5] Capriotti had explained to petitioner that he had permission from an official from the Illinois Bank and Trust department approving Intercounty's investment of Intrust monies, and those monies were to be returned to Intrust. Petitioner understood, per Capriotti, that the Intrust funds were segregated for Intrust's benefit. Tr. 2939-40.

accounting, an agreement with Capriotti ended the controversy. Tr. 2933-34.[6]

Fast forwarding to February 2000, Peloza and Cornell contacted petitioner (living in Florida most of the time after about 1996) relating that Capriotti had "made-off" with money from the escrow accounts. Petitioner returned to Chicago and, with an attorney, met with Illinois Bank/Trust officials, revealing that Capriotti had confessed to taking the Intercounty escrow monies. Peloza told petitioner that the Intercounty escrow account needed funding, and petitioner provided $2 million dollars. As it turned out, $40 million was missing from Intercounty's escrow and petitioner lost the $2 million he furnished. Tr. 2964.

Thereafter, petitioner met with Fidelity auditors (it guaranteed Intercounty's policies from 1995 to February 2000), and they advised that Intercounty escrow accounts were short between $8 and $10 million dollars. After meeting with Fidelity petitioner pledged almost all of his assets as collateral to keep Intercounty operating. Tr. 2964-65. Fidelity reneged, Intercounty closed, and petitioner's collateral was never refunded. Tr. 2965-66.

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[6] Later petitioner heard from Peloza and Cornell. They told him that an individual Capriotti hired was destroying the companies and furnished petitioner with Capriotti's [Intercounty] American Express records which disclosed that Capriotti squandered over one-half million dollars of Intercounty money for cars and gifts to his girlfriends. Tr. 2929.

6. PETITIONER'S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE, HIS JURY INSTRUCTION(S) OBJECTIONS, SUMMATIONS, AND JURY NOTES.

In advance of summations, at Tr. 3349, the district court rejected petitioner's Rule 29 motion which included:

> Judgment of acquittal should be entered on the fraud counts because the mail/wire fraud statutes do not define essential terms, including "property" and "honest services," fail to provide adequate notice of the proscribed conduct, thereby violating the Due Process Clause of the Fifth Amendment to the United States Constitution.

R. 198. Moreover, during the district court's unrecorded Rule 30 jury instruction conferences, the court rejected petitioner's "honest services" and related instructions, while overruling his objections to the government's instructions. R. 205 at pp. 1-3, ¶s 2-4. App. 31-32, 65-68 at ¶s 2-4.

Concerning mail/wire fraud/honest services/ intangible rights, the government summations urged plenary guilty verdicts, while disjoining [the] offense elements:

> Now at the heart of a mail fraud charge and a wire fraud charge is the idea of the existence of a scheme, the concept of a scheme. And Judge Moran is going to instruct you that a scheme to defraud is a

> scheme that is intended to, one, deceive or cheat another and to obtain money or property; two, to cause the potential loss of money or property; *or three, to deprive another of the intangible rights to honest services.*

Tr. 3193 (emph. added). And at Tr. 3218 ("They wanted to cheat the victims to gain money, or to deprive the victim of their right to honest services of the entities they owned, operated or controlled because the customers of Intrust, the customers of Intercounty, Stewart Title Company – they had a right to believe they were receiving honest services from the companies they were doing business with. That's a right given to them by law. And if the people intended to deprive them of that, that can be a crime."). And at Tr. 3244 ("But it also shows that Hargrove acted with the intent to defraud those same victims of their right to honest services."). And at Tr. 3252 ("He had a fiduciary duty to be straight with those people and he breached it and people did not get their right to honest services like they thought they were.").

The district court's "honest services" instructions were limited to the following:

> *In considering where a defendant has engaged in a scheme to defraud another of a right to honest services*, you must first find that an alleged victim was owed a fiduciary duty. That is, you must find that an alleged victim was owed a fiduciary duty in the

> operation of Intercounty Title Company of Illinois, Intercounty Title Company – Indiana, ITI Enterprises, and/or Independent Trust Corporation as described in counts One through Seven of the superseding indictment. You must further find that the defendant you are considering intentionally – *you are considering intentionally caused that fiduciary duty to be violated for the personal gain of some participant in the scheme whether or not that defendant benefitted.*

Tr. 3458 (emph. added) (the district court's complete "honest services/fiduciary duties" instructions are reproduced at App. 33-39, *infra*).

During deliberations, the jury sent the following notes:

> 9/15/05 – jury notes . . . First jury note dated 9/15/05 . . . there is one juror in tears and making statements that they are not willing to return tomorrow. May I request a meeting with you to explain our situation in the jury room?
>
> Second Jury Note – 9/15/05 – we have concluded on Hargrove; we have come to a conclusion on count 8 for Thyfault . . . but are hung on counts 1, 2, 3 and 4.
>
> Third Jury Note – 9/12/05 – please clarify jury instruction 60 as compared to 46; and 37 as compared to 30 . . . which takes precedent? Can you please come and explain.

> Fourth Jury Note – does for personal gain have any difference than resulted in personal gain as included in instruction No. 39? The court provided an answer . . . in interpreting instruction No. 39 you should use your commonsense, in the context of all the instructions.

R. 214 (not available on Pacer's electronic docket).

The district court met with counsel regarding the jury's questions. Questions regarding instructions 30 and 37 related to honest services and fiduciary duties. Tr. 3478, 3480. App. 40-51. Petitioner objected to the honest services instruction. Tr. 3481. App. 49-50. Following the district court supplemental instructions, the jury returned guilty verdicts on counts one-eight (mail/wire fraud/conspiracy counts), each embracing, in part, honest services/intangible rights/ fiduciary duties. R. 217. App. 52.

7. POST-TRIAL AND APPEAL.

Post-trial, petitioner sought a new trial, arrest of judgments, and/or judgments of acquittal, invoking Fed.R.Crim.P. Rules 29(c), 33 and 34. R. 224. App. 53-62. In relevant part, petitioner's post-trial filings perpetuated his "honest services" objections. R. 224 at pp. 2 at ¶ 4, 5-6 at ¶ 16, 8 at ¶s 22-23. App. 55 at ¶ 4, 59-60 at ¶s 16 and 19, 62 at ¶s 22-23.

The district court denied post-trial relief, and on June 29, 2006, petitioner was sentenced to concurrent fourteen-year sentences (petitioner has served the

36-month concurrent IRS sentences on counts nine and eleven and is not challenging those convictions).

On direct appeal petitioner contended that his convictions for mail/wire fraud and § 371 conspiracies should be reversed because 18 U.S.C. § 1346 is [was] unconstitutional as violative of the void-for-vagueness doctrine embodied in the Fifth Amendment. The Court of Appeals rejected petitioner's constitutional arguments and affirmed. App. 3-4.

REASONS FOR GRANTING THE PETITION

I. 18 U.S.C. § 1346, BY OMITTING COMPREHENDIBLE STANDARDS CONCERNING "INTANGIBLE RIGHTS AND HONEST SERVICES" IN PRIVATE ACTOR CASES, RENDERS PETITIONER'S PRIVATE ACTOR CONVICTIONS INVALID BECAUSE § 1346 IS UNCONSTITUTIONAL, PURSUANT TO THIS COURT'S FIFTH AMENDMENT'S VOID FOR VAGUENESS JURISPRUDENCE, BASED ON THE ABSENCE OF FAIR NOTICE REGARDING PROHIBITED CONDUCT WHICH CREATES AN UNDUE RISK OF ARBITRARY AND DISCRIMINATORY CRIMINAL ENFORCEMENT.

Apropos to petitioner, Justice Scalia's insightful dissent in *Sorich v. U.S.*, included:

> If the "honest services" theory – broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers – is taken

> seriously and carried to its logical conclusion, presumably the statue also renders criminal * * * *and any self-dealing by a corporate officer.*

129 S.Ct. at 1309 (emph. added).

Petitioner has reviewed the briefs and oral arguments in *Black, et al. v. U.S.*, No. 08-876, *Weyhrauch v. U.S.*, No. 08-1196, and *Skilling v. U.S.*, No. 08-1394 (arguments scheduled for March 1, 2010). Little is gained from gratuitous repetition and petitioner accepts that consideration of his certiorari petition will be informed by the antecedent honest services/intangible rights briefs and arguments in the aforementioned cases. Accordingly, out of respect for brevity, petitioner summarizes relevant arguments and authorities presented in *Black, Weyhrauch* and *Skilling*.

1. TITLE 18 U.S.C. § 1346 STATUTORY HISTORY AND [THE] VOID-FOR-VAGUENESS DOCTRINE.

The statutory legacy from the Court's opinion in *McNally v. U.S.*, 483 U.S. 350 (1987), 18 U.S.C. § 1346, was succinctly recounted in *U.S. v. Brumley*, 116 F.3d 728, 739 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting):

> On the last day of the 100th Congress in October 1988, Congress passed a highly publicized and much debated omnibus drug bill. Attached to that omnibus bill, as one of

> some 30 other unrelated provisions, was a provision containing the text of what has now been codified as 18 U.S.C. § 1346. *See* Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.

More recently, Circuit Judge Jacobs, joined by three colleagues, dissented in *U.S. v. Rybicki*, 354 F.3d 124, 156 (2nd Cir. 2003) (*en banc*), finding that (under plain error) "the so-called 'honest services' amendment to the wire and mail fraud statute, 18 U.S.C. § 1346, flunks the test for facial vagueness set forth by the Supreme Court in *City of Chicago v. Morales.*" (Quotation marks added, *Morales* citation omitted.). Within Circuit Judge Jacob's strident *Rybicki* dissent, he analyzes sister circuit cases serving to demonstrate [that] the lack of ascertainable principles renders [§ 1346] facially invalid. Pp. 161-163 (citing pre- and post-*McNally* decisions).

2. THIS COURT'S VOID-FOR-VAGUENESS DECISIONS.

Recently, in *U.S. v. Williams*, ___ U.S. ___, 128 S.Ct. 1830 (2008), the Court, reviewing the First Amendment and 18 U.S.C. § 2252A, *et seq.*, reversed the Fifth Circuit's holding concerning promotion of child pornography. Justice Scalia, writing for the Court, explained [that the] vagueness doctrine

> is an outgrowth of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process [if] the statute under which it is obtained fails to provide a

> person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

Id. at 1845 (citations omitted). Earlier, in *Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513, 525, 114 S.Ct. 1747 (1994), Justice Blackmun explained:

> The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (Scalia, J. with Kennedy and Thomas, J.J., concurring.).[7]

This Court's void-for-vagueness precedents include *City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849 (1999) ("Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of ordinary notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."). (Parallel citations omitted). Finally, Justice Scalia's discerning dissent from the denial of

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[7] Justice Scalia's concurring opinion, after discussing the available legislative history regarding 21 U.S.C. § 857, observed: "I point that out, not because I think those statements are pertinent to our analysis, but because it displays once again that our acceptance of the supposed teachings of legislative history is more sporadic than our professions of allegiance to it." 511 U.S. at 530 (citations omitted).

certiorari in *Sorich v. U.S.*, 129 S.Ct. 1308 (2009), noted that § 1346 consists of "only 28 words," [and] its impact has divided the federal circuit courts of appeals over the last 20-years because those courts have engrafted a variety of limiting principles – while attempting to "cabin" the "breadth of § 1346." 129 S.Ct. at 1309 (pet.'s quotation marks). Justice Scalia explained: "Second and relatedly, this Court has long recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." * * * There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct. But "the notion of a common-law crime is utterly anathema today," * * * and for good reason. It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail. "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" * * * It may be true that petitioners here, like the defendants in other "honest services" cases, have acted improperly. But "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law." * * * ." 129 S.Ct. at 1310, 1311 (citations omitted).

As the Court's decisions in *Williams, Posters 'N' Things,* and *Morales* explain, the reasons for finding statutory enactments facially invalid finds expression within the Fifth Amendment's void for vagueness jurisprudence. Petitioner's case accents the importance of the constitutional and institutional interests

at stake. Petitioner is serving a fourteen year sentence, and therefore, his § 1346 void-for-vagueness arguments are not abstract or esoteric exercises. Rather, like Messrs. *Black* and *Skilling*, and potentially *Weyhrauch*, it may well be that his 24/7 prison immurement is a direct result of the government's overzealous exploitations of § 1346.

3. PETITIONER'S FACIAL INVALIDITY ARGUMENT GAINS SUPPORT FROM THE DIVERGENT PRE- AND POST-MCNALLY LOWER COURT DECISIONS CONCERNING THE PURPORTED ELEMENTS AND REACH OF § 1346.

Before and after *McNally*, the lower courts employed a variety of honest service/intangible rights rationale while affirming private sector/actors mail/wire fraud convictions. For example, in *U.S. v. Louderman*, 576 F.2d 1383 (9th Cir. 1978), the court affirmed defendant's convictions where he was able to gather confidential information for "skip-tracing" (locating debtors who "skipped-out" on unpaid bills). While affirming, the court examined sister circuit cases involving "intangible rights," explaining:

> Several schemes involving *intangible rights* have been successfully prosecuted under the "scheme to defraud" clause of § 1341. * * * As such, "[t]he statute includes a broad proscription of behavior for the purpose of protecting society."

576 F.2d at 1388 (emph. added; quoting from the Seventh Circuit decision in *U.S. v. Keane*, 522 F.2d at 544 (1975)). Thus, the Ninth Circuit embraced the Seventh Circuit's "intangible rights" interpretation that it (intangible rights) was [is] broadly designed to protect society.

Concerning fiduciary duties, in *U.S. v. Bronston*, 658 F.2d 920 (2nd Cir. 1981), a divided court affirmed the conviction of an attorney who attempted to enhance his law firms business by arguably violating amorphous fiduciary duties to a client. In part, the affirming majority explained:

> Although a mere breach of fiduciary duty, standing alone, may not necessarily constitute a mail fraud, * * * the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute. * * * *As we noted in Von Barta, supra, proof that the fiduciary relationship was used or manipulated in some way is not necessary.*

658 F.2d at 926 (emph. added). Thus, according to the *Bronston* majority, the non-disclosure of material fiduciary information is a violation of the [mail fraud] statute where the non-disclosure "could or does" result in harm. But . . . proof of manipulation of the fiduciary relationship was not necessary for mail fraud affirmation. See also *U.S. v. Condolon,* 600 F.2d 7, 8-9 (4th Cir. 1979) (. . . "The fraudulent scheme

need not be designed to obtain money or property, nor need it involve the breach of a fiduciary relationship.") (emph. and quotation marks added). The *Condolon* court, citing Eighth and Ninth Circuit decisions observed that the statute was violated with schemes "*to deprive the public of intangible civil rights.*" *Id.* at 9 (emph. added).[8]

A distillation of pre-*McNally* cases disclose that private sector defendants have had their mail/wire fraud convictions affirmed: (1) with or without breaching some or another fiduciary duty, and (2) without contemplated or foreseeable economic harm/gain. After *McNally*, the government invoked § 1346 to charge university professors and students in a scheme where the professors helped the students by providing unearned college degrees, and in turn, the

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[8] From pp. 39-42 in Petitioner's opening brief in *Skilling v. U.S.*, No. 08-1394, he cites pre-*McNally* decisions showing the conflict and confusion within sister circuits reasoning while upholding mail fraud convictions under the guise of honest services/intangible rights. *Cf.*, *U.S. v. Lemire*, 720 F.2d 1327, 1335-37 (D.C. Cir. 1983) (fiduciary trusted position – required element; employment relationships requiring contemplated or foreseeable economic harm); *contra*, *U.S. v.* Bronston, 658 F.2d 920, 926 (2nd Cir. 1981) (proof that the fiduciary relationship was used or manipulated in some way is not necessary); *U.S. v. Price*, 788 F.2d 234, 237 (4th Cir. 1986) (economic injury need not be shown); *U.S. v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982) (no requirement of contemplated loss of money or property).

Similarly, at p. 15 of the NACDL Amicus Brief in *Black, et al. v. U.S.*, No. 08-876, it cites pre-*McNally* decisions including, *inter alia*, U.S. *v. Condolon, ante,* in support of the facial invalidity of § 1346.

students helped get government contracts, *U.S. v. Frost*, 125 F.3d 346 (6th Cir. 1997). In *Frost*, while affirming in part, and reversing in part, the court held that reasonably foreseeable economic harm to the victim was essential for conviction perpetuation concerning honest services. 125 F.3d at 368. *Cf., U.S. v. Vinyard*, 266 F.3d 320, 327-29 (4th Cir. 2001) (same – rejecting materiality § 1346 test – in favor of reasonably foreseeable [economic] harm); *U.S. v. deVegter*, 198 F.3d 1324, 1328-30 (11th Cir. 1999) (same); and *U.S. v. Pennington*, 168 F.3d 1060, 1064-65 (8th Cir. 1999) (must cause or intend to cause actual harm or injury – meaning financial or economic harm).

In contrast, the Fifth Circuit in *U.S. v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006), held that failure to disclose rises to the level of a fiduciary duty breach – without regard to any realistic economic harm. *Cf, U.S. v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (no personal gain required where indictment charged an intent to deprive victim of "the right of honest services."); *U.S. v. Panarella,* 277 F.3d 678, 691-92 (3rd Cir. 2002) (no private gain required); *U.S. v. McGeehan*, 584 F.3d 560, 571 nn. 9-11 (3rd Cir. 2009) (same while examining sister circuits' private actor § 1346 decisions from Sixth, Eighth, Tenth, Eleventh and D.C. Circuits).[9] Without further belaboring the

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[9] *U.S. v. Frost*, 125 F.3d 346, 366, 368 (6th Cir. 1997) (reasonably foreseeable economic harm essential – federal law governs fiduciary duties); *U.S. v. Ervasti*, 201 F.3d at 1036 (8th

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fractured rationale from the lower courts concerning intangible rights/honest services, it is pellucid their disharmonious opinions clearly support petitioner's void-for-vagueness arguments.

4. RELEVANT UNITED STATES RESPONSES DURING ORAL ARGUMENTS IN *BLACK* AND *WEYHRAUCH*.

During its *Black* argument, the government rejected the Court's suggestion that the lower courts were "massively" confused concerning § 1346. Rather, the government contended that the intangible right of honest services achieved the status of [a] "term of art" because the lower courts used "essential synonyms" including faithful/loyal and honest services . . . divided loyalties of an agent or a fiduciary. Oral Tr. at 29-31.[10] Moreover, the right to intangible services refers to a "legal," not "moral" obligation. *Id.* at 31.

Cir. 2000) (fiduciary relationship not required element), *U.S. v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (§ 1346 potentially turns conduct regulated by state and civil court into federal crimes); *U.S. v. Browne*, 505 F.3d at 1265 (11th Cir. 2007) (breach of fiduciary duty sufficient to establish § 1346 fraud); *U.S. v. Sun-Diamond Growers, et al.*, 138 F.3d 961, 973 (D.C. Cir. 1998) (possibility of converting every private sector dishonesty into a federal crime by using mail).

[10] In *U.S. v. Handakas*, 286 F.3d 92, 104 (2nd Cir. 2002), the court, employing plain error, reversed § 1346 convictions explaining that as of 1997 the terms "intangible rights" and "honest services" had not achieved *terms of art*, they are not found in Black's Law Dictionary, or any federal statute, or the

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The government represented that § 1346 created a federal obligation – not dependent on State law. *Id.* at 32. The government contended that personal conflicting financial interests, which are ascertainable are at the "core" of the majority of lower court decisions, but, § 1346 has application in noneconomic fiduciary [duties] including doctor-patient and lawyer-client. *Id.* at 34-35.[11]

The government also maintained that "economic loss" was not an element of § 1346 in the Second Circuit, citing *Rybicki* [354 F.3d 124], but per *Rybicki,* there must be materiality and an intent to defraud, asserting that the Second Circuit has not included economic loss as an element of intangible rights fraud, either before or after *McNally*. According to the government, materiality in the business world is coexistent with economic harm . . . perhaps including "harm to reputation" which interferes with the ability of a business to go forward. Summarizing Tr. 35-39,

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U.S. Code, other than § 1346, citing *U.S. v. Brumley*, 115 F.3d at 742 (Jolly, J., dissenting). The *Handakas* court observed: That observation [not terms of art] remains accurate today. Thus, there was no well-defined or commonly understood, legal or popular honest services/intangible rights definitions when Congress enacted § 1346.

During its arguments in *Weyhrauch v. U.S.,* the government continued maintaining that "intangible right" was a term of art. Oral Tr. at 47.

[11] In contrast to the government's argument, the lower courts, including the Eighth Circuit in *U.S. v. Ervasti,* 201 F.3d 1029, 1036 (2000), concluded that the existence of a fiduciary relationship is not an element of honest services fraud.

41. Importantly, the government seemingly agreed there is no "bright line rule" between economic harm and other potential § 1346 cases. *Id.* at 41-42. The government explained beyond "kickbacks" and "bribes," questions concerning the broad range of conflicting interests and fiduciary duties involves agents engaging in undisclosed self-dealing and the purpose of § 1346 was the desire by Congress to protect against frauds involving intangible rights, and commonlaw fiduciary duties were assimilated into the law of frauds. *Id.* at 46, 47-48.

While commenting on *Black's* case, the government seemingly conceded that based on intangible rights, at least in public sector cases, contemplated or foreseeable economic harm would "knock out" many pre-*McNally* public official cases. *Id.* at 49. But the government's flexible "materiality" [§ 1346] theory would function much like contemplated economic harm in private-sector cases. *Id.* at 50.

On December 8, 2009, the Court also heard arguments in *Weyhrauch v. U.S.* In part, the government agreed that the Court's questions regarding vagueness and § 1346 were legitimate concerns, but seemed to fault the *post-McNally* discordant body of law – on this Court's failure to provide earlier guidance. Oral Tr. at 48-49, 51-52. The government also contended that the Court's § 1346 consideration might be informed by referring to civil rights cases. *Id.* at 44.[12]

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[12] Recently, in *Harman v. Pollock*, 586 F.3d 1254 (10th Cir. 2009), the court considered qualified immunity to police officers

(Continued on following page)

Given the amorphous scope of § 1346, and the inability of the lower courts and legal scholars to divine the contours of [§ 1346], petitioner maintains that he should not be held to a higher standard than the Federal Appellate Courts and those who have analyzed [§ 1346] for over two decades.

II. PETITIONER'S CONVICTIONS FOR CONSPIRING TO VIOLATE FEDERAL MAIL AND WIRE FRAUD STATUTES, WHERE THOSE CONVICTIONS INCORPORATED – HONEST SERVICES AND INTANGIBLE RIGHTS – SHOULD BE REVERSED WHERE THE TRIAL COURT REFUSED TO CHARGE THE JURY THAT PETITIONER'S "COMPENSATION" AS A CORPORATE OFFICER/EMPLOYEE DID NOT COMPRISE "PRIVATE GAIN."

Petitioner's case, *sub judice,* reveals that petitioner may well fall within [the] "[b]ad men – like good men" dichotomy. Justice Scalia's *Sorich* dissent. 129 S.Ct. at 1311. He was an Intercounty officer for over a decade, and the government presented dozens

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within the context of 42 U.S.C. § 1983. While affirming the granting of summary judgment in favor of defendant police officers, the majority likened "clearly established law" with "fair warning" (holding that the police did not violate "clearly established law"). 586 F.3d at 1260-61 (citations omitted).

Petitioner maintains that "fair warning" and "clearly established law" are rooted in the Fifth Amendment's void-for-vagueness jurisprudence in that an accused in a criminal case must have "fair warning" based on "clearly established law" that his or her conduct violates a criminal statute.

of documents, some he acknowledged signing (others not), which unknowingly served to further schemes concocted by Capriotti to pilfer Intercounty's and Intrust's escrow funds. Petitioner denied knowing that Capriotti was embezzling escrow funds with the help of his guilty pleading cohorts, Wallwin, Stimac, Peloza and Cornell (and possibly petitioner's trial co-defendant, Thyfault, but the jury was not satisfied with the government's case as to Thyfault).

Be that as it may, the truncated "honest services" jury instructions, coupled with significant segments of the government's summation, *ante* at pp. 23-24, undermined petitioner's Fifth Amendment due process protections – not to be remanded to federal prison for conduct beyond the 28 words comprising § 1346. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies the question remains what process is due."). Petitioner asserts that he should not have been compelled to stand trial based, in part, on the vague wording of § 1346 – [a] federal statute which the Court should hold to be facially invalid.

Furthermore, the jury instructions, bolstered by the government's references to "honest services" and intangible rights, based on putative fiduciary breaches, failed to alert the jury that the amorphous concept of "personal gain" did not (and should not) have included petitioner's compensation during his years with Intercounty.[13] Moreover, in response to the

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[13] Recently, in *U.S. v. Garcia-Pastrana*, 584 F.3d 351, 384 (1st Cir. 2009), the court quoted segments of the district court's

(Continued on following page)

quartet of jury-deliberation questions, *ante* at pp. 25-26, petitioner's counsel reminded the trial court of his earlier objections to the honest services instructions. Tr. 3481. App. 49-50. Petitioner's post-trial motion, incorporating his jury instruction objections, asserting that the trial court erred in failing to charge the jury that receiving compensation did not constitute "personal benefits" or "personal gain" within the meaning of private sector § 1346 jury instructions. R. 224 at pp. 5-6, 8. App. 55 at ¶ 4, 59 at ¶ 16.

The government will concede that petitioner, like all defendants, is constitutionally guaranteed the right to have the trial jury instructed concerning essential elements of charged offenses. See *In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068 (1979) (State must prove beyond a reasonable doubt the facts necessary to establish each element of the offense charged, *Patterson v. New York,* 432 U.S. 197, 210, 97 S.Ct. 2319 (1977) (same); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078 (1993) (explaining that Due Process Clause of Fifth Amendment and Sixth Amendment jury verdict requirements are "interrelated."). Here, not withstanding that § 1346 includes "intangible rights," nowhere in the court's jury charge regarding "honest services" is there any reference, let alone any definition of

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"fiduciary" jury instructions: "Remember that bad management, careless or innocent reasons by themselves do not constitute a crime." (Quotation marks added). Petitioner's jury was not similarly instructed.

intangible rights. App. 35-39. If "intangible rights" is pivotal within § 1346, then the complete absence of any defining instructions clearly deprived petitioner of those constitutional protections guaranteed by the Fifth and Sixth Amendments in *In Re Winship*, *Patterson*, and *Sullivan*, *ante*.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner
Jack Hargrove

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-2883

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK HARGROVE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CR 779 – **James B. Moran**, *Judge*.

ARGUED OCTOBER 20, 2008 – DECIDED AUGUST 26, 2009

Before BAUER, KANNE and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*. Jack Hargrove was charged with seven counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343; a single count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371; three counts of filing false tax returns in violation of 26 U.S.C. § 7206; and a single count of income tax evasion in violation of 26 U.S.C.

§ 7201. Before trial, Hargrove moved to dismiss the mail fraud charges on the ground that the honest-services provision of the mail fraud statute, 18 U.S.C. § 1346, is unconstitutionally vague. The district court denied the motion and the case proceeded to trial. Hargrove was convicted of all charges except income tax evasion and one count of filing false tax returns, on which he was acquitted. On appeal, Hargrove renews his challenge to the constitutionality of the mail fraud statute; we affirm.

I. BACKGROUND

Hargrove and Laurence Capriotti were co-owners of Intercounty Title Company of Illinois ("Intercounty"), a Chicago-based title insurance and escrow agent. The company sold title insurance policies issued by Stewart Title Guaranty Company.

By the late 1980s, Intercounty was running an annual deficit in the millions as the result of a price war in the title insurance market. To cover its losses, Intercounty invested in junk bonds in the hopes that the bond yield would outperform their real estate obligations. The plan backfired, and Intercounty got itself into a hole from which it never recovered.

Over a ten-year period beginning in 1990, Hargrove and other executives at Intercounty engineered numerous fraudulent schemes under which the title company's deficits were covered by thefts from its escrow account. In total, the fraudulent practices robbed Intercounty of more than $60 million.

Before trial and again at the close of evidence, Hargrove challenged the mail fraud charge on the basis that 18 U.S.C. § 1346 was unconstitutional on its face and as applied. Hargrove argued that the statute is void for its vagueness because it fails to provide adequate notice of what conduct is proscribed. The district court rejected Hargrove's challenges. The jury was allowed to consider whether Hargrove had committed mail fraud; it determined he had and returned a conviction. Hargrove appealed.

II. DISCUSSION

On appeal, Hargrove initially raised two arguments, but he has since withdrawn one. In his brief, Hargrove raised an ineffective assistance of counsel claim, contending that his primary trial attorney suffered from either a potential or actual conflict of interest. However, at oral argument, Hargrove requested to withdraw this claim. As he correctly noted, claims of ineffective assistance of counsel are disfavored on direct appeal because the factual foundation for such claims is often undeveloped. Hargrove requested the opportunity to build a more complete record for his claim and we granted his request to do so.

Hargrove's remaining claim is a challenge to the constitutionality of the mail fraud statute under which he was convicted. He contends that 18 U.S.C. § 1346 is void for vagueness because it does not define the criminal offense with sufficient definiteness such

that ordinary people can understand what conduct is prohibited and, moreover, it encourages arbitrary and discriminatory enforcement. According to Hargrove, he could not have known that the conduct underlying his convictions could be considered to have deprived another of the "intangible right of honest services" under § 1346.

The constitutionality of a statute is an issue of law which we review de novo. *United States v. Olofson,* 563 F.3d 652, 659 (7th Cir. 2009). As Hargrove acknowledges, this Court has soundly rejected the claim that the mail fraud statute, as applied to an intangible-rights theory, is void for vagueness. *United States v. Hausmann,* 345 F.3d 952, 958 (7th Cir. 2003); *United States v. Warner,* 498 F.3d 666, 697 (7th Cir. 2007). In Hargrove's brief, he argues that the issue may be ripe for reconsideration in light of *United States v. Thompson,* 484 F.3d 877 (7th Cir. 2007). However, he fails to posit any reason why *Thompson* conceivably could undermine *Hausmann. Thompson* did nothing to disturb the central holding of *Hausmann,* which is that the mail and wire fraud statutes, §§ 1341, 1343 and 1346, are not unconstitutionally vague, as applied under the intangible-rights theory.

At oral argument, Hargrove informed this Court that he has raised the claim solely for the purposes of preserving the issue in the event that the Supreme Court chooses to consider it at some future date. Fair enough.

For the foregoing reasons, we AFFIRM the judgment of the district court.

[Illegible]

[LOGO]

Everett McKinley Dirksen United States Courthouse
Room 2722-219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

August 26, 2009

BEFORE: WILLIAM J. BAUER, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*

No.: 06-2883	UNITED STATES OF AMERICA, Plaintiff-Appellee v. JACK L. HARGROVE, Defendant-Appellant

Originating Case Information:
District Court No: 1:03-cr-00779-2 Northern District of Illinois, Eastern Division District Judge James B. Moran

The judgment of the District Court is **AFFIRMED** in accordance with the decision of this court entered on this date.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Moran	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	03 CR 779 - 1-5	**DATE**	12/30/2003
CASE TITLE	USA vs. LAURENCE W. CAPRIOTTI, et al		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

MEMORANDUM OPINION AND ORDER

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due ___.

(3) ☐ Answer brief to motion due ___. Reply to answer brief due ___.

(4) ☐ Ruling/Hearing on ___ set for ___ at ___.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ___ set for ___ at ___.

(7) ☐ Trial [set for/re-set for] on ___ at ___.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ___ at ___.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]

☐ FRCP4(m) ☐ Local Rule 41.1
☐ FRCP41(a)(1) ☐ FRCP41(a)(2)

(10) ■ [Other docket entry] Enter Memorandum Opinion And Order re pretrial motions.

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.		Dec. 31, 2003	
	Notices mailed by judge's staff.		date docketed	73
	Notified counsel by telephone.		/s/ [P.P.]	
✓	Docketing to mail notices.		docketing deputy initials	
	Mail AO 450 form.			
	Copy to judge/ magistrate judge.	Date/time received in central Clerk's Office	date mailed notice	
LG	courtroom deputy's initials		mailing deputy initials	

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LAURENCE W. CAPRIOTTI, JACK L. HARGROVE, MICHEL D. THYFAULT, JAMES R. WALLWIN and GEORGE J. STIMAC, Defendants.	)	No. 03 CR 779

MEMORANDUM OPINION AND ORDER

This white-collar crime case alleges a lengthy financial scheme in a lengthy indictment of 51 pages in 17 counts of mail fraud, wire fraud, conspiracy, income tax violations and false insurance company reports, as well as forfeiture allegations. That indictment has spawned numerous motions. They can be dealt with rather summarily because this is essentially an open file case.

In responding to the motions the government has grouped them, and that appears to be a reasonable approach. A motion to suppress filed by defendant Hargrove is on hold and another motion was preciously granted. We turn to the other motions.

Defendant Hargrove has moved to adopt the "applicable" motions of his co-defendants and

defendant Capriotti has moved to adopt Hargrove's motions. They are denied as unnecessary. The rulings on the substantive motions will govern the proceedings, whether or not a particular defendant initiated the motion. Hargrove has also moved for leave to file additional motions if necessary. That open-ended motion is denied. If any defendant believes it necessary to file additional motions because of the way the case had developed we are prepared then to entertain a motion for leave.

Hargrove and Thyfault have filed various scheduling motions, and the government agrees with the concept although not necessarily the timing or extent. The first is a *Santiago* proffer. Hargrove asks for 90 days prior to trail. The government counters with four weeks. We think six weeks is ample, with a recognition that subsequent trial preparation may require the government to slightly amend or amplify its proffer. The defendants should file any objections 14 days prior to trial.

The government previously proposed to give notice of any proposed Rule 404(b) evidence 30 days before trial. Hargrove has asked for 90 days; the government now counters with eight weeks. We think eight weeks is ample. The government also asks that any objections be filed four weeks before trial. We say three weeks, as that will provide enough time for any briefing and rulings.

Hargrove moves the production of Jencks Act material 90 days before trial. We cannot order early

production, although we can (and do) urge that it be done. The government agrees to produce all witness statements and interview summaries eight weeks prior to trial, and that satisfies Hargrove. Defendants should, likewise, produce such material prior to trial. The government suggests two weeks prior to trial, and that is reasonable.

Hargrove and Thyfault move for the production of all *Brady/Giglio* material 90 days before trial (Hargrove), or immediately (Thyfault). The government represents that it has already disclosed all *Brady* material of which it is aware and that it will promptly produce any *Grady* material that may subsequently turn up. It also suggests eight weeks prior to trial for *Giglio* material, which Hargrove believes is too short, as, he contends, he has a right to it now, but Thyfault does not object to that. We think eight weeks makes sense, as *Giglio* material will correlate with the Jencks Act material, which will also be produced eight weeks prior to trial.

Thyfault and Hargrove both move for the production of expert witness materials pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E). The government recognizes its obligation and suggests eight weeks before trial. Hargrove wants them now, in order to facilitate his obtaining his own experts. We see no reason to delay production once they have been prepared, but the government may well not have those materials now. They should be produced promptly after they are prepared, and not later than eight weeks prior to trial. Conversely, defendants

shall produce expert witness materials promptly after they have been prepared and not later than five weeks before trial, and they shall file any objections to proposed expert testimony by four weeks before trial, with the government responding within ten days and defendants replying seven days thereafter.

The government agrees to Hargrove's motion for the production of summary charts and Hargrove agrees to the production being six weeks before trial and recognizes that there may thereafter be some fine-tuning. Conversely, the defendants shall produce any such summary charts two weeks before trial, and the filing of any objections to the government summaries shall follow the same schedule as objections to the government's proposed expert testimony.

Hargrove moves for an order directing the government to identify its trial exhibits 60 days before trial. The government agrees to produce them four weeks in advance, provided that defendants identify theirs (both cross-examination and defense-in-chief) two weeks before trial. Both the government and Hargrove understand that such a list is not cast in stone – there will inevitably be some additions and deletions as the trial date approaches. The government's schedule is based upon the fact (and it is a fact) that trial preparation is a dynamic process. The government shall identify those trial exhibits six weeks prior to trial that it has then determined to be trial exhibits, with a supplemental identification two weeks later. The defendants shall identify theirs two weeks prior to trial. Neither the government nor the

defendants have an obligation to identify, prior to trial, exhibits to be used solely for cross-examination.

Both Thyfault and Hargrove move for production of witness lists. They rest on notions of fundamental fairness in light of the number of possible witnessers and the probable length and complexity of the trial. The government objects, and technically it is correct. It recognizes, however, that both sides need to know, if possible, in advance, what witnesses will testify in order to prepare adequately for their interrogation. It therefore agrees to provide such a list of prospective witnesses "at a reasonable time shortly before trial" provided the defendants do the same prior to their case-in-chief. We think a reasonable time is ten days before trial for the government and seven days for defendants before the defense is likely to commence. And each side should notify the other of the order in which they expect the witnesses will testify, two days in advance of their testimony.

Thyfault moves for an order directing the government to produce to him, or to submit to this court for *in camera* inspection, all grand jury testimony and the history of the grand jury's deliberations. The government objects. That motion is denied. Disclosure of grand jury materials requires a showing of a particularized need. None has been shown. That something may turn up is not enough, and the length of time the scheme was alleged to cover adds little. Defendant will have Jencks Act material well before trial, which will give him the

grand jury testimony of the prospective government witnesses.

Thyfault also moves for an order permitting him access to any electronic recordings used in the investigation of this case not previously provided. The government represents there are none. Accordingly, the motion is denied as moot. Another Thyfault motion seeks Fed.R.Crim.P. 16 production. The government responds that it has complied with its Rule 16 obligations and will continue to do so, although it notes that the movant's characterization of those obligations is overly broad. Thyfault does not take issue with that response. The motion is denied as moot.

Thyfault moves for an order directing the government to disclose its analysis of the Sentencing Guidelines. While vigorously objecting, the government has indicated that it is willing to disclose what it currently believes the applicable guideline range to be, although other information may turn up. That is the most defendant can seek; neither the government nor the court is bound by that present analysis. Moreover, any contention based upon the possibility that the government may move for an upward departure at sentencing is premature. There has not been any trial yet, much less a conviction. The motions is denied as moot.

Both Hargrove and Thyfault move for a bill of particulars. Those motions are denied. While the

defendants could possibly benefit from some additional detail in their defense preparation, they are going to be provided with trial exhibits, expert reports, summary charts, a *Santiago* proffer, a witness list, and Jencks Act material well before trial, and they have already been provided Rule 16 disclosures. If, closer to trial, they believe they are still unable to determine what is meant by certain allegations, they can renew their motions.

They have also moved to strike certain allegations as surplusage. We deny the motions. In many instances the words and phrases are characterizations of what the government will seek to prove. They are words and phrases the defendants can expect to hear in the government's opening statement and closing argument. As the jury will be instructed, neither the indictment nor the attorneys' arguments are evidence, and the government's burden will be detailed in the instructions. We would strike irrelevant language that is prejudicial and inflammatory, but not of it is. Thyfault is also concerned about the use of "others" or "defendants" in various allegations, contending that the jury might believe him to be implicated in certain conduct when he was not and the government is not arguing that he was. Again, the indictment in not evidence; it charges Thyfault explicitly when the government contends he was involved; the questioned allegations do not, read carefully, implicate him; and we have no doubt that the government will make clear to the jury what it contends Thyfault's role was and was not.

Hargrove's motion to dismiss or strike the mail fraud counts is denied. He contends that the statute itself must provide "fair warning" of prohibited conduct rather than subsequent judicial interpretation. The Seventh Circuit disagrees. *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). And the conduct alleged fits very comfortably within the judicial gloss of what are not "honest services." Further, even the dissent in *United States v. Brumley*, 116 F.3d 728, 740-741 (5th Cir. 1997) (*en banc*), relied upon by movant, recognizes that victims of the nature alleged here are the rational definition of "another." *And see United States v. Warner*, 2003 WL 22697289, *13 (N.D.Ill.).

Finally, Hargrove moves for an order precluding the admission at trial of codefendants' out-of-court statements or, in the alternative, for severance. Such statements may well trigger *Bruton* concerns, but definitive rulings are premature because we do not know what statements the government may seek to use or for what purpose. The government proposes the disclosure of unprotected statements it will seek to use eight weeks before trial (with, presumably, any appropriate redactions), and defendant would have four weeks to object. This is a reasonable approach. Proffer-protested statements will have to be dealt with at trial. In either event, the government is directed not to refer to such statements at trial unless it has sought and obtained a judicial

ruling permitting it to do so. This motion is entered and continued.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S.
District Court

Dec. 30, 2003.

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 03 CR 779-2
JACK L. HARGROVE	USM Number: 16300-424
	EDWARD M. GENSON Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1,2,3,4,5,6,7,8,9 and 11 of the superseding indictment after a plea of not guilty

The defendants adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 1341	Mail Fraud affecting a Financial Institution	2000	1,2,3,4,6 and 7
18 U.S.C. 1343	Wire Fraud affecting a Financial Institution	2000	5
18 U.S.C. 371	Conspiracy to Defraud the United States	2000	8
18 U.S.C. 7206(1)	Filing a False Income Tax Return Under Penalty of Perjury	2000	9 and 11

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 10 and 12 of the superseding indictment

X Count(s) All remaining counts ☐ is X are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

JUNE 29, 2006
Date of Imposition of Judgment

/s/ James B. Moran
Signature of Judge

JAMES B. MORAN,
U.S. DISTRICT JUDGE
Name and Title of Judge

JUNE 30, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

168 months on each of counts 1-7; 60 months on count 8; 36 months on each of counts 9 and 11 (all counts to run concurrent to each other.)

X The court makes the following recommendations to the Bureau of Prisons:

It is recommended that defendant be placed in a facility as close to Fort Lauderdale, Florida as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 2 p.m. on September 19, 2006.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years on each of counts 1-8; 1 year on each of counts 9 and 11 (all to run concurrent to each other).

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 1,000.00	$	$ 58 million

☐ The determination of restitution is deferred ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Order	Priority or Percentage
See attached Restitution Information Sheet		58,000,000	
TOTALS	$ _____	$ 58,000,000	

☐ Restitution amount ordered pursuant to plea agreement ___

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the ☐ fine X restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

RESTITUTION INFORMATION

United States v. Laurence W. Capriotti and Jack L. Hargrove, No. 03 CR 779

Defendants Laurence W. Capriotti and Jack L. Hargrove are ordered to pay, jointly and severally with each other, restitution in the amount of $58,000,000. The first $9,250,000 paid in restitution by the defendants shall be distributed to the Receiver for Independent Trust Corporation, Pricewaterhouse Coopers LLP ("the Intrust victims"). After that, the

Intrust victims shall be paid $31,687,500, and Fidelity National Title Insurance Company of New York ("Fidelity") shall be paid $17,062,500, with each payment distributed as follows: 65% to the Intrust victims, and 35% to Fidelity. The defendants' joint and several restitution obligations shall be reduced by any amounts obtained by way of criminal forfeiture from either defendant and returned to the victims.

Checks distributed to the Intrust victims should be made payable to Independent Trust Corporation, in Receivership and should be mailed to:

_____

Checks distributed to Fidelity should be made payable to Fidelity National Title Insurance Company of New York and should be mailed to:

Mark E. Schiffman
Senior Vice President
Chief Litigation Counsel
Fidelity National Financial, Inc.
601 Riverside Avenue, 11th Floor
Jacksonville, FL 32204

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ ____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B X Payment to begin immediately (may be combined with ☐ C, ☐ D or, X F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay any financial penalty that is imposed by this judgment on a monthly payment schedule of 10% of his net monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those

payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

58 million to be paid joint and several with co-defendant Laurence Capriotti (Case No. 03 CR 779-1).

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

58 Million: See attached Preliminary Order Of Forfeiture
See attached Memorandum Opinion And Order dated June 26, 2006

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 2009

Before

WILLIAM J. BAUER, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-2883

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	
JACK HARGROVE, *Defendant-Appellant.*	No. 03 CR 779 James B. Moran, *Judge.*

ORDER

On consideration of defendant-appellant's petition for rehearing filed on September 1, 2009, in connection with the above-referenced case, all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing is DENIED.

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.

Defendant's Hargrove Instruction # 5

Seventh Circuit Committee § 4.06 (1998)

To prove a scheme to defraud, that a defendant reasonably foresaw that the scheme could cause come economic or pecuniary harm to the victim that is more the *de minimis*.

Defendant's Instruction # 17

United States v. Rybicki, 355 F.3d 124, 145-46 (2nd Cir. 2003) (*en banc*) (discussing approaches to mail fraud statute)

See United States v. Vinyard, 266 F.3d 320 (4th Cir, 2001)

United States v. deVegter, 198 F.3d 1324 (11th Cir. 1999)

United States v. Sun-Diamond Growers of California, 138 F.3d 961 (D.C. Cir. 1998)

But see United States v. Hausmann, 345 F.3d 952 (7th Cir. 2003)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	No. 03 CR 779
Plaintiff,	Chicago, Illinois
v.	September 9, 2005
	10:00 a.m.
JACK L. HARGROVE and MICHAEL D. THYFAULT,	Trial
Defendants.	

VOLUME 20
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. MORAN,
and a jury

APPEARANCES

For the Government:	UNITED STATES ATTORNEY'S OFFICE, by MR. ROBERT W. KENT, JR. MR. BART HUFF MR. SCOTT R. DRURY Assistant United States Attorneys 219 South Dearborn Street – 5th Floor Chicago, Illinois 60604
For Jack L. Hargrove:	GENSON & GILLESPIE, by MR. EDWARD M. GENSON MS. LENA WINTERS 53 West Jackson Boulevard – Suite 1420 Chicago, Illinois 60603

MR. MARC W. MARTIN
53 West Jackson Boulevard –
Suite 1420
Chicago, Illinois 60603

For
D. Michael Thyfault:

MR. PAUL A. WAGNER
321 South Plymouth Court –
Suite 1500
Chicago, Illinois 60604

In considering whether a defendant has engaged in a scheme to defraud another of a right to honest services, you must first find that an alleged victim was owed a fiduciary duty. That is, you must find that an alleged victim was owed a fiduciary duty in the operation of Intercounty Title Company of Illinois, Intercounty Title Company – Indiana, ITI Enterprises, and/or Independent Trust Corporation as described in Counts One through Seven of the superseding indictment. You must further find that the defendant you are considering intentionally – you are considering intentionally caused that fiduciary duty to be violated for the personal gain of some participant in the scheme whether or not that defendant benefitted.

A "fiduciary" is a person or entity who owes a special duty of fidelity and loyalty to another, who is called his "principal." When one owes a fiduciary duty to another person or entity, one is required to provide that person with honest services, to treat that person or entity with undivided loyalty, good faith, fairness and honesty, and to disclose all material facts to that person or entity. A fiduciary may not take advantage of the principal's ignorance.

[3459] There are several types of relationships that involve fiduciary duties of one person or entity to another.

Directors or officers owe a fiduciary duty to their corporation.

A trustee owes a fiduciary duty to its trust holders.

An escrow agent owes a fiduciary duty to its customers who place money in escrow with the escrow agent. This fiduciary duty requires strict conformance to the escrow agreement. Where the escrow agent is holding a trust company's funds, the escrow agent owes a fiduciary duty of a trustee to both the trust company and its trust holders.

A title insurance agent owes a fiduciary duty to the title insurance company that provides the title insurance policies.

In Count Eight of the superseding indictment, the defendants are charged with conspiring to commit offenses against the United States, namely, defrauding title insurance customers, Stewart Title Guaranty Company, Fidelity National Title Insurance Company of New York, Intrust, Intrust trust holders, federally-insured financial institutions and others of money, property and intangible right of honest services, in violation of Title 18, United States Code, Section 3171.

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To

prove the charge of conspiracy, the government must prove:

[3460] First, that the conspiracy as charged in Count Eight existed;

Second, that the defendant knowingly became a member of the conspiracy with an intention to further the conspiracy; and,

Third, that an overt act was committed by at least one conspirator in furtherance of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

A conspiracy may be established even if its purpose was not accomplished.

It is not necessary that all the paragraphs describing acts in furtherance of the conspiracy or the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a

reasonable doubt that the [3461] defendant was aware of the common purpose and was a willing participant.

In deciding whether the charged conspiracy exists, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all the alleged participants which are shown by the evidence.

In deciding whether a particular defendant joined the charged conspiracy, you must base your decision only on what the defendant did or said. In determining what the defendant did or said, you may consider that defendant's own words and acts. You may also consider the words and acts of other persons to decide what that defendant did or said.

To establish the existence of a conspiracy and its common purpose, the government need not establish that there existed a formal agreement to conspire. The conspiracy may be proved by circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts and the totality of their conduct.

The conspiracy alleged in Count Eight charges that the named defendants conspired to commit different substantive offenses. To prove that the charged conspiracy existed, the government must prove that the defendant conspired to commit any one of the offenses against the United States that is listed in that count. It is not necessary for the government [3462] to prove that the defendant conspired to

commit all of these offenses. However, in order to return a verdict of guilty, you must unanimously agree upon which of the listed offenses the defendant conspired to commit. If you cannot agree in this manner, you must find that defendant not guilty of the conspiracy charged in that particular count.

A conspirator is responsible for offenses committed by his fellow conspirators if he was a member of the conspiracy when the offense was committed and it the offense was committed in furtherance of and as a foreseeable consequence of the conspiracy.

Therefore, if you find the defendant Hargrove guilty of the conspiracy charged in Count Eight and if you find beyond a reasonable doubt that while defendant Hargrove was a member of the conspiracy, his fellow conspirators committed any of the offenses in Counts One through Seven in furtherance of and as a foreseeable consequence of that conspiracy, then you should find defendant Hargrove guilty of those offenses in Counts One through Seven.

Similarly, if you find defendant Thyfault guilty of the conspiracy charged in Count Eight and if you find beyond a reasonable doubt that while defendant Thyfault was a member of the conspiracy, his fellow conspirators committed any of the offenses in Counts One through Four in furtherance of and as a foreseeable consequence of that conspiracy, then you should [3463] find defendant Thyfault guilty of those offenses in Counts One through Four.

A defendant's association with conspirators is not by itself sufficient to prove his participation or membership in a conspiracy or scheme.

If a defendant performed acts which advanced a criminal activity but had no knowledge that a crime was being committed, those acts alone are insufficient to establish a defendant's guilt.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JACK L. HARGROVE and MICHAEL D. THYFAULT, Defendants.	No. 03 CR 779 Chicago, Illinois September 12, 2005 11:25 a.m.

VOLUME 21
TRANSCRIPT OF PROCEEDINGS – TRIAL
BEFORE THE HONORABLE JAMES B. MORAN

APPEARANCES:

For the Plaintiff:
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MR. MARC W. MARTIN
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(312) 408-1111

MR. PAUL A. WAGNER
321 South Plymouth Court,
Suite 1500
Chicago, Illinois 60604
(312) 913-1145

[3473] (Proceedings in open court. Jury out.)

THE COURT: Come on back.

(Proceedings in chambers. Jury out.)

THE COURT: I've got a question about the instructions. Since I don't have a copy of them, I gave my copy to them, who has got a copy of the instructions?

MR. KENT: There's a good set.

THE COURT: Okay. Compared to a bad set?

MR. KENT: I think that, you know, it has the last minute language of that one instruction.

THE COURT: They wanted clarification of instruction 60 as compared to 46.

I will say they have also, as you know, they wanted everybody to have a copy of the instructions, everybody have a copy of the indictment, they wanted an easel, markers, notebooks.

MR. MARTIN; Standard requests.

THE COURT: And not only Danish and coffee in the morning, but also fruit and –

MR. KENT: A jury that knows its mind.

THE COURT: The jury does know its mind.

60 is "Each count of the indictment charges each" – well, 46 is Pinkerton, and 60 is "Each count of the indictment charges each defendant named in that count having committed a separate offense."

[3474] MR. MARTIN: Judge, if you recall, we had objected to the Pinkerton instruction on grounds that it was inconsistent with 46, and I don't recall exactly what I said, but I predicted we might, the jury might pick up on it.

THE COURT: Well, what do we say?

MR. MARTIN: Withdraw the Pinkerton instruction.

MR. KENT: The question is which takes precedence?

THE COURT: Yes. Then they've got 37 compared to 30, 37 is –

MR. KENT: Victim is defrauded of property.

THE COURT: And 30.

MR. WAGNER: 30 is with regard to Hargrove. I don't know what that –

THE COURT: I don't see where 30 and 37, what the problem is there.

MR. KENT: 37 is one of the ways that an honest services fraud can happen – or, no, it's how a fiduciary can commit a property fraud.

And then 30 has to do with mails and wires.

THE COURT: I can't figure that one out.

MR. KENT: I can't figure that one out.

MR. WAGNER: I don't –

MR. MARTIN: We can't figure it out either.

MR. WAGNER: Yes.

MR. KENT: I don't understand how 60 and 46 are [3475] necessarily in conflict.

THE COURT: Well, I can see what the problem is, is that –

MR. DRURY: I don't think 46 and 60 are that inconsistent. If there's a question about precedence, 46 would take precedence, but –

MR. HUFF: They have to apply both.

THE COURT: Right, they have to apply both. But in 46, there what we are saying is that if they, if somebody is found to be a member of the conspiracy, he is responsible for the acts of the

conspiracy, a conspirator during the period is a member of the conspiracy.

MR. HUFF: I believe that's an accurate statement of the law.

THE COURT: But that means if you then look at 60, that they are going to have to review the evidence to determine whether the government has proved that he's a member of the conspiracy, among, with respect to the conspiracy count, and during what period.

MR. DRURY: And consider each defendant separately. That's all 60 says.

THE COURT: And I'm not, I just don't understand what they mean by 37 and 30.

MR. KENT: So –

THE COURT: Maybe the thing to do is go down to 14 to [3476] the courtroom, bring them in and tell them what I just told them, what I just said with respect to the first question, and ask them what their confusion is on 37 an 30.

MR. KENT: And invite an oral statement from the foreperson?

THE COURT: From the jury, and we will caucus again having heard it and see how I respond to it.

MR. MARTIN: Your Honor, what exactly are you going to say with respect to the first question?

THE COURT: I am going to say that 46 in effect says that if you are a member of a conspiracy, you are responsible along with your fellow conspirators for what was done in furtherance of the conspiracy during the periods you were a member.

MR. MARTIN: It has to be reasonable.

THE COURT: But 60 –

MR. KENT: It has to be reasonably foreseeable.

MR. MARTIN: Right, that's what I was going to say.

THE COURT: Yes, but if you – but what 60 is saying is but before you can do that, you are going to have to, on the basis of all the evidence, determine whether the government had proved to you that the person is a member of the conspiracy during a particular period, and that each person is entitled to a independent evaluation of that issue.

MR. KENT: That sounds fair to the government.

[3477] MR. MARTIN: Judge, for the record, we would object consistent with our objection at the beginning that the Pinkerton instruction should not be given for exactly this reason, that the jury would take the two instructions they have highlighted as

being inconsistent. I know the Court means well, but in effect you're giving them a new instruction after the arguments and after the jury instructions conference, so we would object to that and stand on our original request asking that the Pinkerton instruction not be given.

MR. WAGNER: I join in that objection, Judge.

THE COURT: Okay. Shall we go down and –

MR. HUFF: And then on the second one, you're going to ask them for?

THE COURT: A clarification, and then we caucus.

MR. HUFF: Are you guys alright with that?

MR. MARTIN: Yes.

MR. HUFF: Getting an oral? Great.

(Proceedings in open court. Jury out.)

THE COURT: Mr. Wagner, Mr. Thyfault is not here.

MR. WAGNER: That's right, I called. he's somewhere –I called him on the cell phone. I left him a message and he said he was entitled to be here.

THE COURT: Well, it's his obligation to be reachable.

MR. WAGNER: Yes, all right. Well, I'll try him [3478] again and see if I can get him here.

MR. HUFF: Or at least get him to waive?

MR. KENT: We're were puzzling over the possible conflict between 30 and 37. 30 relates to the one wire fraud that Mr. Hargrove is charged with.

THE COURT: Right.

MR. KENT: That' s the April 23rd wiring of $5.7 million.

THE COURT: Right.

MR. KENT: And I'm just wondering whether they are thinking that in order to find him guilty of that, he must have personally benefited from it as in a way that 37, 37 talks about one way that a fiduciary can commit fraud. And it sounds like maybe they are trying to figure that one out. And, of course, that's just one way for a defendant to participate in a scheme to defraud. It's not the only way.

THE COURT: And referring to 39?

MR. KENT: Which one is 39?

THE COURT: That's "intentionally cause that fiduciary duty to be violated for personal gain by some participant in this scheme whether or not that defendant benefited."

MR. MARTIN: Can we find out whether Mr. Capriotti is the source of the conflict?

THE COURT: Right.

[3479] (Pause.)

MR. WAGNER: He's on his way, Judge. When I talked, he is within five minutes.

THE COURT: Okay. Did you tell them him to just meet us up here?

MR. WAGNER: Yes.

MR. MARTIN: Your Honor, even if Mr. Kent is incorrect in his perception, can we confer before you respond?

THE COURT: Yes.

MR. MARTIN: Okay.

(Pause.)

THE COURT: Well, I'll say both to Mr. Thyfault and to Mr. Hargrove, you don't have to be here when we work out answers to questions that the jury may have. You have a right to be here. It does mean you have to be close by and easily accessible. But it's something that you may very well choose to just leave up to your lawyers to work out the answers.

(Jury in.)

THE COURT: Well, good morning, everybody. It still is morning. Please have a seat.

On your first question, the relationship between instruction 60 and 46: In 46, it basically is saying, well, that a conspirator is responsible for offenses committed by his fellow conspirators if he was, if he was a member of the conspiracy when the offense was committed and if the offense [3480] was committed in furtherance of and as a foreseeable consequence of the conspiracy.

If we turn to instruction 60, what that's really saying to you, you're going to have to separately consider whether or not the government has proved that Mr. Hargrove was a conspirator and, if so, during what period, and whether Mr. Thyfault was a conspirator and, if so, what period. So that you have to give separate consideration to the question of the issue of being a member and for what period.

And then I think, you know, depending on what your answer is to that, then 46 I think is understandable.

When we came to comparing 37 to 30, we were a little confused as to what was confusing you.

A JUROR: Well, that was my question.

THE COURT: Oh.

A JUROR: Some of the instructions said that in order to be guilty of violating fiduciary duty, you have to be, also have some personal gain. And so we just wanted to make sure, find out like in order to be guilty, does there have to be personal gain or can there not be personal gain?

THE COURT: And I think we can answer that, but first I'm going to have to have a little caucus with the lawyers.

(Discussion at sidebar.)

THE COURT: It seems to me that all I really need to do is refer them to instruction 39.

[3481] MR. MARTIN: Your Honor, for the record, as you'll recall, our main jury instruction objection was to the instruction that stated that the government did not have to prove intent to economically deprive the victim. We had submitted a counterinstruction on that point noting a split in the circuits.

It appears that that's what the jury's confusion goes to.

THE COURT: I don't think so. I think it's the language that got added as a result of the Spanoff decision.

MR. KENT: Correct, Your Honor. In fact, the instruction that they are looking at is not, it mentions the word "fiduciary," but it'[s not an honest services instruction actually. It is a way that a fiduciary can commit a property fraud, and so we would support the plan that you announced.

THE COURT: I don't think we need to do anything more than refer them to 39.

MR. MARTIN: We would ask the Court to refer them to all the instructions as opposed to highlighting one instruction.

THE COURT: Well, except they've got a specific question.

(End of proceedings at sidebar.)

THE COURT: Well, ladies and gentlemen, if you refer to instruction 39, I think that answers your question, and I [3482] refer specifically to the last sentence in instruction 39.

A JUROR; Right, but that's only for the taxes. What about just –

THE COURT: No, this is –

A JUROR: Oh, instruction 39? I'm looking at the wrong one, I'm sorry.

Okay. That answers the question.

THE COURT: Okay. And we will – you go back to deliberating, and we'll go back to what we were doing.

(Recess. Jury out.)

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James B. Moran	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	03 CR 779 - 2	**DATE**	9/15/2005
CASE TITLE	USA vs. JACK HARGROVE		

DOCKET ENTRY TEXT:
Jury returns its verdict against defendant Jack L. Hargrove, Guilty as charged in Count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 of the superseding indictment and Not Guilty as charged in Counts 10, 12 of the superseding indictment. Trial ends – Jury. Docketing to mail notices.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 03 CR 779
v.	)	Judge James B. Moran
JACK L. HARGROVE and MICHEL D. THYFAULT	)	(Filed Oct. 14, 2005)

DEFENDANT HARGROVE'S MOTION FOR NEW TRIAL, MOTION TO ARREST JUDGMENT AND MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT

Defendant Jack L. Hargrove, by his attorneys, pursuant to Rules 29(c), 33, and 34 of the Federal Rules of Criminal Procedure, respectfully moves this Honorable Court to enter an order granting a new trial, arresting judgment or entering judgment of acquittal. In support thereof, the following is offered:

1. Before and during the trial, Defendant Hargrove filed certain motions and raised legal issues. The Court ruled after consideration of arguments and pleadings. We do not intend to reargue legal issues that have already been considered by the court. By the same token, Mr. Hargrove does not abandon or waive the positions taken in this litigation. We shall offer an outline of errors justifying a new trial, arrest of judgment and/or judgment of acquittal. With respect to each of the points noted

below, Mr. Hargrove incorporates herein by reference all arguments made in open court, motions or memoranda, or at sidebar, and adopts oral and written arguments made by his co-defendant, Michael D. Thyfault.

NEW TRIAL

2. The Court erred in denying Mr. Hargrove's pretrial Motion for Bill of Particulars. In the opinion dated December 30, 2003, the Court stated that the lack of detail in the indictment is cured by requiring the government to produce, among other things, trial exhibits, a Santiago proffer, and a witness list "well before trial." However, the government failed to provide the same "well before trial," thus prejudicing Mr. Hargrove's ability to thoroughly prepare his defense. Specifically, approximately one-half of the government's trial exhibits (of approximately 900 exhibits total) were provided to Mr. Hargrove approximately two weeks before trial, while certain exhibits were provided just days before trial, and yet others were provided during trial. Further, the government's witness list was provided to Mr. Hargrove on the first day of trial. Finally, while the Santiago proffer was submitted by the government well before trial, the Santiago proffer lacked detail, as confirmed by this Court during one of the pre-trial conferences. Thus, Mr. Hargrove's right to a fair trial was prejudiced by the government's delayed production of the necessary materials.

3. The Court erred in denying Mr. Hargrove's pretrial Motion to Strike Prejudicial Surplusage from the Superseding Indictment. Mr. Hargrove's right to a fair trial was compromised by the prejudicial nature of certain sentencing allegations contained in the superseding indictment.

4. The Court erred in denying Mr. Hargrove's pretrial Motion to Dismiss or Strike the Mail Fraud Counts.

5. The Court erred in denying Mr. Hargrove's Motion to Suppress Evidence and admitting the telephone conversations recorded by Intrust's phone system.

6. The Court erred in granting, in part, the government's corrected Motion Regarding Non-Charged Acts and allowing the government to present evidence that Mr. Hargrove allegedly filed materially false personal and corporate income tax returns for five years in addition to those alleged in the indictment. Such evidence was more prejudicial than probative and confusing to the jury.

7. Mr. Hargrove's right to a fair trial was prejudiced by the admission of Government Exhibit 37 – a transcript of a 1989 board meting – into evidence. That transcript was irrelevant and constituted inadmissible hearsay evidence.

8. The Court erred in permitting Mr. Bertacchi to testify, over objection, that Mr. Hargrove never followed up on his promises to return money to

Intrust. The question posed by the prosecutor inappropriately assumed facts not admitted into evidence, namely (1) that Mr. Hargrove had control of the money to be returned to Intrust, and (2) that Mr. Hargrove promised to return the money – as opposed to try to talk Capriotti into returning the money.

9. The Court erred in permitting the government, on numerous occasions, to ask questions in the form of "Were you aware that . . . " followed by an example of an alleged wrongdoing by Mr. Hargrove. While asking such questions, the prosecutors had no good faith basis to believe that a witness was indeed aware of any wrongdoing by Mr. Hargrove. The questions were meant to plant a seed into the jury's mind that Mr. Hargrove not only engaged in the alleged wrongdoing, but also concealed it from multiple witnesses. Such questions are argumentative and attempt to elicit evidence that is more prejudicial than probative. By way of example, over Mr. Hargrove's objection, the government asked the following question during the direct examination of Mr. Malcolm Morris, knowing full well that the answer would be "no:" "Did you ever hear of a TI file involving Mr. Hargrove that was negative in the hundreds of thousands or millions of dollars?"

10. The Court erred in permitting Mr. Bertacchi testify, over objection, that the reason he tried to keep Mr. Hargrove informed of the Intrust's financial situation was that "it was a very important subject, that he [Mr. Hargrove] should know what was going on, and I always looked for him for help." The

question inappropriately called for irrelevant speculation and Mr. Bertacchi's state of mind. The admission of this evidence prejudiced Mr. Hargrove's right to a fair trial.

11. The Court erred in precluding Mr. Hargrove from eliciting testimony of the government witness, Ms. Colson's, bias, and denying Mr. Hargrove's oral motion to allow such evidence.

12. Mr. Hargrove's right to fair trial was violated when the government failed to grant immunity from prosecution to Ms. Susan Peloza and Mr. Terry Cornell, effectively barring Mr. Hargrove from calling them to testify for the defense. Mr. Hargrove's attorneys contacted the attorneys for Ms. Susan Peloza and Mr. Terry Cornell prior to trial and were informed that both Peloza and Cornell would invoke their Fifth Amendment right to remain silent and avoid possible self-incrimination. If government granted Peloza and Cornell immunity, there would have been no danger that their testimony would be used against them, so they could have been compelled to answer questions and potentially forced to present evidence favorable to defendant Hargrove.

13. Moreover, Mr. Hargrove's right to fair trial was violated when the government failed to require Mr. Laurence Capriotti to testify as part of his plea agreement. Mr. Hargrove's attorneys contacted the attorney for Mr. Capriotti prior to trial and again were informed that Capriotti would invoke his Fifth Amendment right to remain silent and avoid possible

self-incrimination, since he had not yet been sentenced. If government had required Capriotti to testify as part of his plea agreement, he could have been compelled to answer questions and potentially forced to present evidence favorable to defendant Hargrove.

14. Mr. Hargrove's right to a fair trial was prejudiced when, during closing argument, the government played the videotape of Defendant Thyfault's deposition wherein Mr. Hargrove was mentioned in a negative light. During the trial, the Court ruled that the government was precluded from using Thyfault's deposition as substantive evidence against Mr. Hargrove. Despite that ruling, the government used the Thyfault's deposition against Mr. Hargrove thus violating Hargrove's Sixth Amendment right to confrontation (Mr. Hargrove was unable to cross-examine Thyfault, since Thyfault elected not to testify).

15. As argued at the jury instructions conference and in Mr. Hargrove's written Motion, the Court erred in giving government instructions over the defendants' objections. Specifically, the Court erred in overruling the following objections:

> a. Instruction No. 22, paragraph 2 is the "ostrich" definition of knowledge. The instruction is unduly prejudicial in that it dilutes the *mens rea* requirement and is inconsistent with the requirement of intent

to defraud and willfulness, which are essential elements of the mail fraud, tax, and conspiracy charges.

b. Instructions No. 32 and 35: as indicated by questions presented by the jurors during deliberations, the instructions are contradictory and vague.

c. Instruction No. 38: the instruction is not a pattern instruction and is unnecessary.

16. During the jury deliberations, the jurors sent multiple notes with questions to the Court. To the extent that Mr. Hargrove objected to the Court's answers, Mr. Hargrove stands by his oral objections. Specifically, the Court erred in failing to inform the jury that receiving a salary from the company does not constitute "personal benefit" or "personal gain" within the meaning of the jury instructions.

17. The guilty verdicts are against the manifest weight of the evidence and therefore the Court, in its discretion, ought to grant a new trial.

18. The combination of errors deprived Mr. Hargrove of due process and requires a new trial.

JUDGMENT OF ACQUITTAL

19. The government failed to prove beyond a reasonable doubt each and every element of the mail fraud and wire fraud offenses charged in Counts One through Seven. There was insufficient evidence that Mr. Hargrove knowingly and intentionally schemed

to defraud and used the U.S. mail and wires in the process. In fact, Mr. Hargrove presented evidence that he was unaware of the scheme set up by Capriotti and Peloza and was defrauded by them in the same way that various bankers and auditors were. Mr. Hargrove presented evidence that his own moneys were stolen by Capriotti and managed by Peloza in a way that he learned only after the investigation conducted by the government.

20. The government failed to prove beyond a reasonable doubt each and every element of the conspiracy offense charged in Count Eight of the indictment. There was insufficient evidence that Mr. Hargrove knowingly and intentionally conspired to violate United States law. In fact, there was evidence that Mr. Capriotti kept information from Mr. Hargrove and that even more financially-savvy business entities and individuals, such as Stewart Title auditors, bankers, Mr. Bertacchi and others were deceived by Mr. Capriotti, similar to Mr. Hargrove.

21. The government failed to prove beyond a reasonable doubt each and every element of the tax evasion offense charged in Counts Nine and Eleven of the indictment. There was insufficient evidence that Mr. Hargrove willfully filed materially false tax returns in 1996 and 1998. Mr. Hargrove presented credible expert evidence that, in fact, the amounts charged in Counts Nine and Eleven should not have been considered income to Mr. Hargrove.

Specifically, in regards to the 1996 tax return, the government was unable to prove beyond a

reasonable doubt that the funds borrowed on the Charter Bank and Bank of Homewood certificates of deposit were not, in fact, returned to Intercounty's escrow or operating account. Moreover, the government was unable to prove beyond a reasonable doubt that Mr. Hargrove was aware of the fact that the certificates of deposit were cashed in to repay loans from Charter Bank or Bank of Homewood. Further, Mr. Hargrove presented evidence that in regards to the $1,265,000 he received from Intercounty through the First Mortgage account, Mr. Hargrove was being repaid by Intercounty for the amounts he previously loaned to it (which far exceeded $1,265,000), thus negating Mr. Hargrove's responsibility to pay income tax on such amount. The government failed to present any evidence to the contrary.

In regards to the 1998 tax return, the government was unable to prove beyond a reasonable doubt that $1,000,000 received by Mr. Hargrove from the proceeds of sales of the Beacon Cove project was not, in fact, a repayment of moneys Mr. Hargrove loaned to such project. In fact, the government's failure to present such proof is evidenced by the fact that the jury found Mr. Hargrove not guilty of Count Twelve, in which the exact offence is also alleged (Mr. Hargrove receiving $438,000 from the proceeds of sale of the Beacon Cove project under the same circumstances as the $1,000,000 transfer). Similarly, the government failed to prove that moneys received by Mr. Hargrove from Capjac in 1998 were taxable to him, as evidenced by the fact that the jury found Mr.

Hargrove not guilty of tax evasion regarding the same moneys received from Capjac in 1997.

ARREST OF JUDGMENT

22. The mail fraud statute, 18 U.S.C. §§ 1341 and 1346, is unconstitutionally vague on its face and as applied. The mail fraud statute violates due process and fails to provide fair warning of proscribed conduct in that the term "fraud" and "property" are not defined. *Cf. United States v. Martin*, 195 F.3d 961 (7th Cir. 1999).

23. The wire fraud statue, 18 U.S.C. §§ 1343, is unconstitutionally vague on its face and as applied for the reasons stated in the previous paragraph of this Motion.

WHEREFORE, for the reasons stated above, defendant Jack L. Hargrove respectfully requests this Honorable Court to vacate the verdict entered in this case, order a new trial, enter judgment of acquittal, arrest judgment or grant any other equitable and appropriate relief.

Respectfully submitted,

s/ Edward M. Genson

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	**No. 03 CR 779-02**
	)	**Judge Moran**
vs.	)	**(Filed Aug. 31, 2005)**
JACK HARGROVE,	)	
	)	
Defendant.	)	

DEFENDANT HARGROVE'S MOTION FOR JUDGMENT OF ACQUITTAL

Defendant JACK HARGROVE, by his attorneys, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, respectfully moves this Honorable Court for the entry of an order granting judgment of acquittal on all counts naming him as a defendant. In support of this motion, the following is offered:

1. Even viewing the evidence in a light most favorable to the government, the government has failed to prove each and every essential element of the charged offenses beyond a reasonable doubt.

2. Judgment of acquittal should be entered on the fraud counts because the mail/wire fraud statutes do not define essential terms, including "property" and "honest services," fail to provide adequate notice of the proscribed conduct, thereby violating the

Due Process Clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, based on the foregoing and for the reasons stated in open court and in other pleadings, Defendant Jack Hargrove respectfully moves for judgment of acquittal or any other equitable and appropriate relief.

Respectfully submitted,

/s/ Edward Genson

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	**No. 03 CR 779-02**
	)	**Honorable Judge**
vs.	)	**James B. Moran**
JACK L. HARGROVE	)	**(Filed Sep. 9, 2005)**

DEFENDANT HARGROVE'S OBJECTIONS PURSUANT TO RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Defendant JACK HARGROVE by his attorneys, pursuant to Rule 30 of the Federal Rules of Criminal Procedure, states as the grounds for the objection to the jury instructions given and refused by the Court as follows:

This Honorable Court held two jury instruction conferences. Hargrove respectfully reasserts the objections made at those conferences. Grounds for objections are explained below:

1. ***Instruction 22***: Hargrove objects to the second paragraph of Instruction 22, and requests that his Instruction 5 be given instead. The second paragraph is the "ostrich" definition of knowledge. The instruction is unduly prejudicial in that it dilutes the *mens rea* requirement, and risks conviction on felony criminal offenses for negligent or reckless conduct. Moreover, it is inconsistent with the concepts of intent to defraud and willfulness, and intent, which

are essential elements of the mail fraud, tax and conspiracy charges, respectively.

2. ***Instructions 32 and 35***: Instruction 35 states, "In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable harm to the victims of the scheme." The instruction is a correct statement of Seventh Circuit law. *See United States v. Hausman*, 345 F.3d 952 (7th Cir. 2003); *United States v. Fernandez*, 282 F.3d 500 (7th Cir. 2002). The circuits, however, are badly divided on the meaning of the "honest services" mail fraud statute. The varying approaches are discussed in *United States v. Rybicki*, 355 F.3d 124, 145-46 (2nd Cir. 2003) (*en banc*). Some circuits have opted for a materiality test. *Id.* Others require a violation of state law, or state law creating a fiduciary duty, to be the foundation for an "honest services" mail fraud offense. *See United States v. Murphy*, 323 F.3d 102, 109-10 (3rd Cir. 2003); *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (*en banc*); *see also United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999) ("tying the concept of fraud in the mail fraud statute to state law and to federal statutes expressly creating federal duties would ally the persistent concerns about the breadth and vagueness of the statute"). Still other circuits require that the defendant intend economic harm. *See United States v. Vinyard*, 266 F.3d 320 (4th Cir. 2001); *United States v. deVegter*, 198 F.3d 1324 (11th Cir. 1999); *United States v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998). Hargrove

submitted an instruction (# 17), refused by the Court, that required proof that the defendant intended economic harm to the victim. Hargrove Instruction 17 should have been given, and Instructions 35 (and 32) should have been refused.

3. ***Instruction 38***: While this instruction was approved in *United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991), that case predated *Neder v. United States*, 527 U.S. 1 (1999). The instruction is unnecessary. It is not a pattern instruction. It seemingly attempts to engraft a form of a materiality test. In accordance with *Neder*, however, the jury is already being instructed on materiality.

4. In his motion for judgment of acquittal, Hargrove asserted that the mail fraud statute is unconstitutional. Hargrove reasserts that position here and wishes to allow the record to reflect that his acquiescence to the mail fraud instructions is without prejudice to his constitutional arguments.

WHEREFORE, based upon the foregoing, and for the reasons stated at the instructions conferences, Defendant Jack Hargrove respectfully move this Honorable Court to refuse the Government's Instructions described above, give the Defendant's

Instructions described above, or grant any other appropriate relief.

Respectfully submitted,

/s/ Marc W. Martin

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA	)	**No. 03 CR 779-02**
	)	**Honorable Judge**
vs.	)	**James B. Moran**
	)	
JACK L. HARGROVE	)	**(Filed Oct. 16, 2003)**

DEFENDANT HARGROVE'S MOTION TO DISMISS OR STRIKE MAIL FRAUD COUNTS

Defendant JACK HARGROVE by his attorney, pursuant to Rules 7(d) and 12(b) of the Federal Rules of Criminal Procedure, respectfully moves this Honorable Court to enter an order striking or dismissing the mail fraud and mail fraud conspiracy charges, Counts One through Eight. In support of this motion, the following is offered:

1. Counts One through Seven charge Hargrove with mail fraud in violation of 18 U.S.C. § 1341. Count Eight charges Hargrove with conspiracy to commit mail fraud.

2. Effective November 1988, and as a response to *McNally v. United States*, 483 U.S. 350 (1987), Congress amended the mail fraud statute by enacting 18 U.S.C. § 1346, which provides that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Each mail fraud-related count in this case includes alleged violations of the "honest services" prong.

3. The Due Process Clause of the Fifth Amendment requires that Congress specify the elements of an offense in terms that provide reasonably understandable notice of proscribed conduct. A statute that does not yield requisite specificity is subject to a void-for-vagueness challenge, a doctrine the Supreme Court has described as follows:

> As generally stated, the void-for-vagueness doctrine requires (1) that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also Morales v. City of Chicago*, 527 U.S. 41, 58 (1999); *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

4. Because federal criminal offenses are solely creatures of statute, the constitutionally required fair warning must come from the legislature, and not the courts. *See Staples v. United States*, 511 U.S. 600, 604 (1994); *LiParota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Bass*, 404 U.S. 336, 348 (1971). When Congress speaks, it must establish minimally objective guidelines. *E.g., Kolender*, 461 U.S. at 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a statute may permit a standardless sweep [that] allows policemen,

prosecutors and juries to pursue their personal predilections."); *Fasulo v. United States*, 272 U.S. 620, 629 (1926) ("There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.").

5. Applying these concepts here, the "honest services" provision of the mail fraud statute is ambiguous.[1] In *United States v. Martin*, 195 F.3d 961, 965, 967 (7th Cir. 1999), the court noted, without deciding, that the mail fraud statute's failure to define terms could render it unconstitutionally vague. In *United States v. Sawyer*, 85 F.3d 713, 714 (1st Cir. 1996), the court emphasized that the term "honest services . . . eludes easy definition." *See also Cleveland v. United States*, 531 U.S. 12, 25 (2000) (warning of the mail fraud statute capacity for vagueness). In *United States v. Handakas*, 286 F.3d 92, 104 (2nd Cir. 2002), the court indicated that § 1346 may be facially unconstitutional, stating, "If we were the first panel attempting to discern the meaning of the phrase 'honest services' in § 1346, we would likely find that part of the statute so vague as

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[1] In making this motion, we acknowledge that the mail fraud statute has withstood constitutional challenges both before and after the enactment of 18 U.S.C. § 1346. *See United States v. Frost*, 125 F.3d 346, 370 n. 7 (6th Cir. 1997) (citing cases); *but see United States v. Handakas*, 286 F.3d 92 (2nd Cir. 2002). We further acknowledge that the Seventh Circuit recently rejected a constitutional as applied challenge to mail fraud convictions in *United States v. Hausmann*, 2003 WL 22171689 (7th Cir. 9/22/03).

to be unconstitutional on its face." Given the inherent ambiguity of "honest services," § 1346 should be declared constitutionally invalid.

6. Another basis for invalidating the "honest services" mail fraud provision exists. The indictment makes corporate entities – Stewart Title Guaranty Company, Fidelity National Title Insurance Company of New York, Independent Trust Corporation and financial institutions – victims of the alleged mail fraud scheme. As pointed out by the dissent in *United States v. Brumley*, 116 F.3d 728, 740-41 (5th Cir. 1997) (*en banc*), the object of the deprivation under § 1346 – "another" – is not defined anywhere in the United States Code. Based on the principle that criminal statutes must be strictly construed, the *Brumley* dissent found that there were no grounds to expand the definition of "another" to include citizens of a state, a state, or a state agency. *Id.* at 742. Because the instant indictment employs a definition of "another" that includes non-individual entities, the mail fraud counts should be stricken of dismissed.

Respectfully submitted,

/s/ Edward M. Genson

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No. 09-929

In the Supreme Court of the United States

JACK L. HARGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

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In the Supreme Court of the United States

No. 09-929

JACK L. HARGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 579 F.3d 752. The opinion of the district court (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2009. A petition for rehearing was denied on September 23, 2009 (Pet. App. 30-31). On November 17, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to February 2, 2010, and the petition was filed on February 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on seven counts of mail fraud and wire fraud, in violation of 18 U.S.C. 1341 and 1343 (Supp. II 2008); one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371; and two counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to concurrent prison terms of 168 months on the mail and wire fraud counts, 60 months on the conspiracy count, and 36 months on the tax counts. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner and Laurence Capriotti owned a majority stake in Intercounty Title Company of Illinois, a title insurance and escrow agent. Petitioner served as president of the company and Capriotti as the chairman of its board of directors. By the late 1980s, Intercounty was running an annual deficit in the millions of dollars because of a price war in the title insurance market. Petitioner and Capriotti sought to cover those losses by investing Intercounty in junk bonds, but that strategy backfired when Intercounty incurred significant losses on the bonds, further increasing its deficit. Pet. App. 2; Gov't C.A. Br. 6-7, 8.

Beginning in 1987, petitioner and Capriotti engaged in a scheme to misappropriate large sums from Intercounty's escrow account. The escrow account contained deposits from Intercounty's clients as well as customer accounts that petitioner arranged for another company, Independent Trust Company (Intrust), to entrust to Intercounty purportedly for investment in government obligations. Gov't C.A. Br. 9-11. Petitioner and Capriotti misappropriated the funds in Intercounty's escrow account in various ways. Among other things, they ob-

tained loans secured by certificates of deposit purchased with funds from the escrow account, allowed the escrow-funded certificates of deposit to be cashed out in order to pay off the loans, and then applied the loan proceeds to Intercounty's operations. In addition, in 1994, Intercounty's treasurer began transferring escrow money directly to Intercounty's operating account. Petitioner and Capriotti used the stolen funds, *inter alia*, to pay off Intercounty's debt, increase its junk bond investments, purchase commercial property for Intercounty, and support Intercounty's troubled lender. *Id.* at 10-11.

2. In 2003, a grand jury sitting in the Northern District of Illinois returned a superseding indictment charging petitioner was charged with a number of offenses, including one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371, and several substantive counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343 and 1346. Sections 1341 and 1343 criminalize the use of the mail or wires to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. 1341, 1343. Section 1346 defines the term "scheme or artifice to defraud," for purposes of Sections 1341 and 1343, to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The government proceeded on two overlapping theories of mail and wire fraud. In particular, the government argued that, in scheming to steal money from the escrow accounts, petitioner deprived Intercounty's customers, Intrust, and Intrust's account holders (1) of money or property and (2) of their intangible right of honest services. See Indict. Count. I ¶ 2. Before trial and again following the verdict, petitioner unsuccess-

fully challenged the mail fraud and conspiracy charges on the ground that Section 1346 is unconstitutionally vague both on its face and as applied in this case. Pet. App. 3, 16. Petitioner was convicted on the mail and wire fraud counts following a five-week jury trial. *Id.* at 18-19.

3. On appeal, petitioner renewed his claim that Section 1346 is unconstitutionally vague. The court of appeals rejected that argument, affirming petitioner's mail and wire fraud convictions based on its prior decisions in *United States* v. *Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003), and *United States* v. *Warner*, 498 F.3d 666, 697 (7th Cir. 2007). Pet. App. 3-4. Petitioner's only additional contention on appeal was that his trial counsel had a conflict of interest, but petitioner withdrew that claim at oral argument. *Id.* at 3.

ARGUMENT

1. Petitioner contends (Pet. 27-39) that 18 U.S.C. 1346 is unconstitutionally vague. That issue is currently pending before this Court in *Skilling* v. *United States*, No. 08-1394 (argued Mar. 1, 2010). In addition, vagueness concerns about Section 1346 are raised in support of the statutory interpretation issues presented in two other cases currently pending before the Court, *Black* v. *United States*, No. 08-876 (argued Dec. 8, 2009), and *Weyhrauch* v. *United States*, No. 08-1196 (argued Dec. 8, 2009). This Court therefore should hold this petition for a writ of certiorari pending the decisions in *Skilling*, *Black*, and *Weyhrauch* and then dispose of it as appropriate in light of those decisions.

2. Petitioner also seeks (Pet. 39-42) this Court's review of the district court's instructions to the jury on the elements of honest-services fraud. The court instructed

the jury that, in order to convict petitioner of honest-services fraud, it must find that petitioner "intentionally caused [his fiduciary duty to a victim] to be violated for the personal gain of some participant in the scheme whether or not [petitioner] benefitted." Pet. App. 34. Petitioner contends that the court should have included a further instruction that petitioner's compensation as a corporate officer could not qualify as "personal gain." *Id.*

In addition to challenging the facial constitutionality of Section 1346, the petitioner in *Skilling* has raised the question whether, to convict an employee of wire fraud on the ground that he deprived his employer of his honest services, the government must show that the employee intended by his scheme to obtain some "private gain." Skilling contends that any such private-gain requirement should not "include the very gain the employer explicitly contemplated as compensation for the employee's service." Pet. Br. at 53, *Skilling*, *supra* (No. 08-1394).

This Court need not hold this petition pending its decision in *Skilling* on the "employee-compensation" issue because petitioner has failed to preserve that claim. In the district court, petitioner did not request the instruction he now contends was necessary,[1] nor did he object in a timely manner to the district court's failure

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[1] Petitioner appears to suggest (Pet. 41) that he requested an instruction that employee compensation does not qualify as private gain in connection with the jury's mid-deliberations request for clarification of the court's "personal gain" instruction. But the record of that proceeding shows only that petitioner requested an instruction that "intent to economically deprive the victim" is an element of honest-services fraud. See Pet. App. 40-51.

to give such an instruction.[2] Petitioner also failed to raise the issue in the court of appeals; and that court therefore did not address it. Accordingly, the claim of instructional error is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

CONCLUSION

On the first question presented, the Court should hold the petition pending the decisions in *Skilling*, *Black*, and *Weyhrauch* and dispose of it as appropriate in light of those decisions. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2010

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[2] Petitioner raised the employee-compensation issue for the first time in his post-trial motion for a new trial, see Pet. App. 59, which was insufficient to preserve the instructional claim, see Fed. R. Crim. P. 30(d).

Supreme Court, U.S.
FILED
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No. 09-929

In The
Supreme Court of the United States

JACK HARGROVE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

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REPLY BRIEF FOR PETITIONER

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" in the mail and wire fraud statutes, 18 U.S.C. 1341 and 1346, to include a scheme "to deprive another of the intangible right of honest services," is unconstitutionally vague.

At p. 4 of its brief, the government suggests [that] the Court hold this petition pending the decisions in *Skilling, Black,* and *Weyhrauch,* and then dispose of it as appropriate in light of those decisions. Petitioner concurs.

2. Whether the district court should have instructed the jury that petitioner's receipt of compensation as a corporate officer did not constitute "private gain" from his honest-services fraud scheme.

The government seemingly contends that petitioner's instruction issues are not properly before the Court for consideration. Gov. Brf. at pp. 5-6 and n. 2. The government's position is unavailing based on the record below. As example, at App. 66-67 of petitioner's certiorari petition, he reproduced some of his Rule 30 objections, including, *inter alia:*

> 2. Instructions 32 and 35: Instruction 35 states, "In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable harm to the victims of the scheme." The instruction is a correct statement of Seventh Circuit law. *See United States v. Hausman,* 345 F.3d 952 (7th Cir.

2003); *United States v. Fernandez,* 282 F.3d 500 (7th Cir. 2002). The circuits, however, are badly divided on the meaning of the "honest services" mail fraud statute. The varying approaches are discussed in *United States v. Rybicki,* 355 F.3d 124, 145-46 (2nd Cir. 2003) (*en banc*). Some circuits have opted for a materiality test. *Id.* Others require a violation of state law, or state law creating a fiduciary duty, to be the foundation for an "honest services" mail fraud offense. *See United States v. Murphy,* 323 F.3d 102, 109-10 (3rd Cir. 2003); *United States v. Brumley,* 116 F.3d 728, 733 (5th Cir. 1997) (*en banc*); see also *United States v. Martin,* 195 F.3d 961, 966 (7th Cir. 1999) ("tying the concept of fraud in the mail fraud statute to state law and to federal statutes expressly creating federal duties would ally the persistent concerns about the breadth and vagueness of the statute"). Still other circuits require that the defendant intend economic harm. *See United States v. Vinyard,* 266 F.3d 320 (4th Cir. 2001); *United States v. de Vegter,* 198 F.3d 1324 (11th Cir. 1999); *United States v. Sun-Diamond Growers of California,* 138 F.3d 961 (D.C. Cir. 1998). Hargrove submitted an instruction (# 17), refused by the Court, that required proof that the defendant intended economic harm to the victim. Hargrove Instruction 17 should have been given, and Instructions 35 (and 32) should have been refused. Orig. R. 205 at ¶ 2.

Moreover, in his timely post-trial filing, petitioner asserted:

> During the jury deliberations the jurors sent multiple notes with questions to the Court. The extent that Mr. Hargrove objected to the Court's answers, Mr. Hargrove stands by his oral objections. Specifically, the Court erred in failing to inform the jury that receiving a salary from the company does not constitute "personal benefit" or "personal gain" within the meaning of the jury instructions. App. 59, R. 224 at pp. 5-6, ¶ 16.[1]

Furthermore, on CA 7 direct appeal, at p. 32 of his opening brief, petitioner contended:

> During trial proceedings, Hargrove objected to, and proposed a number of jury instructions. R. 205. He argued that the circuit courts were divided on the meaning of "honest services" while outlining sister circuits authority. *Id.* at 1-2. Hargrove proposed that the trial court instruct the jury that proof was required that Hargrove intended economic harm to the victims: "To prove a scheme to defraud, that a defendant reasonably foresaw that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimi.*" *Id.* at 2. The district court rejected the proposed

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[1] The District Court's Pacer Docket in 03 CR 779 fails to reflect any government filing in opposition to petitioner's post-trial motion.

> instruction and, over Hargrove's objection, allowed instructions 32 and 35 as tendered by the government. *Id.*; Tr. 3458-63.

At p. 31 of the government's direct appeal CA 7 brief, while urging Honest Services/Intangible Rights rejection, included:

> Here, the jury was instructed that to convict Hargrove for the honest services *counts* it had to find that a victim of the fraud scheme was owed a fiduciary duty and that Hargrove *intentionally* violated that duty for gain to himself or another. (Citation and record reference omitted).

Thus, the government, having failed to contend any Rule 30 [instruction issue(s)] "waivers" within the proceedings below, "waives" its (for the first time) *certiorari* challenge concerning this issue. *Cf. Steagald v. United States,* 451 U.S. 204, 209, 101 S.Ct. 1642, 1646 (1981) (The Government, however, may lose its right to raise factual issues of this sort before this Court * * * or when it has failed to raise such questions in a timely fashion during the litigation); *United States v. Archibald,* 589 F.3d 289, 298 n. 7 (6th Cir. 2009) (same). Therefore, the Court should reject the government's certiorari "waiver" contentions in light of the record below.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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